No. 2407

United States

Circuit Court of Appeals

For the Ninth Circuit.

PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation,

Plaintiff in Error,

vs.

CHARLES J. SCHLEIF,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

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In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2508.

CHARLES J. SCHLEIF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation,

Defendant.

Names and Addresses of Counsel.

JAMES B. HOWE, Esq., Attorney for Defendant and Plaintiff in Error, Room 403 Electric Building, Seattle, Washington.

A. J. FALKNOR, Esq., Attorney for Defendant and Plaintiff in Error, Room 403 Electric Building, Seattle, Washington.

GEORGE D. EMERY, Esq., Attorney for Plaintiff and Defendant in Error, 422 Central Building, Seattle, Washington. [1*]

In the Superior Court of the State of Washington, for King County.

No. 94,440.

CHARLES J. SCHLEIF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation,

Defendant.

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*Page-number appearing at foot of page of original certified Record.

Complaint.

For complaint herein the above-named plaintiff alleges:

I.

That the defendant is and at all times hereinafter mentioned was a corporation engaged in the business of operating an electric street-car system in the city of Seattle.

II.

That in its business aforesaid the said defendant operated a line of such cars upon and along the public thoroughfare in said city known as Fourteenth Avenue Northeast, and was so operating such cars on the 23d day of January, 1913. That at that time the east one-half of said Fourteenth Avenue, from a point one block south to a point one block north of Fifty-fifth Street, was in an unfinished condition and was being paved and certain public improvements, to wit, water-pipes were being laid therein by the city. That at a point on Fourteenth Avenue N. E. on the south side of Fifty-fifth Street, between the center of said avenue and the east curb line, there was an excavation, circular in form and about six feet in diameter and four feet deep, made by the city for the purpose of constructing therein a water gate in connection with the underground water-pipe then forming a part of its water system; that said excavation extended within about one foot of the east rail of the line [2] of street railway there operated by the defendant.

III.

That this plaintiff was then in the employ of Krough & Jesson, contractors of the city, and was engaged in assisting in the building of the said manhole at and in the excavation aforesaid, and was employed to pass the brick used in such construction from the surface of the street to the mason engaged in the excavation in building said wall.

IV.

That in the course of that employment it was necessary and customary for the plaintiff to be near and frequently to go and to be upon the east track of the said street railway then being so operated by the defendant, which the defendant and its servants then well knew; that said point was in plain view of persons operating defendant's cars approaching from the south for a distance of more than six hundred feet; that it was the duty of defendant in there operating its said cars to give suitable warning of the approach of such cars to said point by ringing a bell or gong, or sounding a whistle, or otherwise suitably warning persons there being of the approach of its cars, and it was the further duty of the defendant to cause its cars to run slowly at said point and to approach the same under complete control, and to avoid accident and injury to persons necessarily there being engaged in such work.

V.

That the defendant on said day at or about the hour of 10:00 A. M. was operating one of its said cars upon and along said street railway, traveling northward at a high rate of speed, to wit, fifteen miles

per hour, to and at the point where said excavation existed, and where said manhole was being constructed, and while the plaintiff was then and there employed as aforesaid; [3] that in so doing the defendant negligently operated and run its said car in this, that it failed and neglected to cause any signal or warning to be sounded by gong, bell, or otherwise, of the approach of its said car to the point aforesaid, and that it negligently caused said car to approach said point at a high rate of speed, to wit, fifteen miles per hour; and failed and neglected to cause the same to slow up upon approaching said point, or to be under control.

VI.

That while this plaintiff was then and there so employed, relying upon the duty of the defendant aforesaid, and its performance thereof, and while his attention was necessarily closely engaged in and fixed upon his said work of passing bricks, as aforesaid, the said defendant so negligently as aforesaid, operated its said car on and along said street railway, at a high rate of speed, to wit, 15 miles per hour, and without warning, as to cause the same to run against and strike the plaintiff, breaking his left leg and two of his ribs, throwing him to the ground and otherwise bruising, breaking, wounding and injuring the plaintiff, and putting him in great peril and pain, and inflicting serious and permanent bodily injury upon him, without fault on his part, to his damage in the sum of Ten Thousand ($10,000) Dollars.

VII.

That plaintiff was compelled to and did lose all his time since the said accident, and will be compelled to

lose the same for a period of six months yet to come on account of said injuries to his further injury in the sum of Five Hundred ($500.00) Dollars.

VIII.

That plaintiff was thereby compelled to and did pay out and expend the sum of One Hundred Fifty ($150.00) Dollars, for hospital [4] fees, nursing and medical and surgical aid and treatment, and will be compelled to pay out and expend as much more for said purpose to his further damage of Three Hundred ($300.00) Dollars.

IX.

That this plaintiff was then a man of forty-three years of age, of sound body and good physical health, and a carpenter by trade, but was then working as a mason's assistant, as aforesaid, and was earning an average of Three ($3.00) Dollars per day, and was capable of earning Five ($5.00) Dollars per day at his trade.

X.

That the scene of said accident was and is within a thickly settled residential section of said city, and the defendant is and was there forbidden to run its said cars at a greater speed than twelve miles per hour in accordance with the provisions of its franchise, to wit, Ordinance No. 5874 of the City of Seattle, entitled "An Ordinance granting to J. D. Lowman and Jacob Furth, their successors and assigns, a franchise to construct, maintain and operate Street railways in the City of Seattle," under which ordinance defendant was then and there so operating its said cars.

WHEREFORE, plaintiff demands judgment against the said defendant in the sum of Ten Thousand Eight Hundred Dollars ($10,800.00), together with his costs and disbursements herein.

GATES & EMERY,
Attorneys for Plaintiff.

Office and Postoffice Address:
422–24 Central Bldg., Seattle, Wash.

State of Washington,
County of King,—ss.

Charles J. Schleif, being first duly sworn, on oath deposes and says: That he is the plaintiff in the above-entitled action, that he has read the foregoing complaint, knows the contents thereof and believes the same to be true.

C. J. SCHLIEF. [5]

Subscribed and sworn to before me this 1st day of May, A. D. 1913.

[Seal] GEO. D. EMERY,
Notary Public in and for the State of Washington,
Residing at Seattle.

Filed in Clerk's Office May 17, 1913. W. K. Sickels, Clerk. By G. A. Grant, Deputy.

Filed in the U. S. District Court, Western Dist. of Washington. Jun. 28, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [5½]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2508.

CHARLES J. SCHLEIF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation,

Defendant.

Answer.

Comes now the defendant and for answer to the complaint of the plaintiff, alleges:

I.

For answer to the allegation of paragraph I of plaintiff's complaint, this defendant admits the same.

II.

For answer to the allegations of paragraph II of plaintiff's complaint, this defendant admits that in its business aforesaid, the said defendant operated a line of such cars along and upon said thoroughfare in said city, known as Fourteenth Avenue, Northeast, and was so operating said cars on the 23d day of January, 1913, and that certain improvement was being made on said Fourteenth Avenue Northeast at or near Fifty-fifth Street. But as to the other things therein alleged, this defendant denies any knowledge or information thereof sufficient to form a belief.

III.

For answer to the allegations of paragraph III of

plaintiff's complaint, this defendant admits that the plaintiff was in the employ of Krough and Jesson, contractors of the city, and was engaged, with others, building a manhole at or near [6] Fourteenth Avenue Northeast and Fifty-fifth Street; but denies any knowledge or information sufficient to form a belief as to the other allegations of said paragraph.

IV.

For answer to the allegations of paragraph IV of plaintiff's complaint, this defendant denies the same.

V.

For answer to the allegations of paragraph V of plaintiff's complaint, this defendant denies the same.

VI.

For answer to the allegations of paragraph VI of plaintiff's complaint, this defendant denies the same, and particularly denies that the plaintiff has been damaged in the sum of Ten Thousand Dollars ($10,000.00), or in any other sum, or at all.

VII.

For answer to the allegations of paragraph VII of plaintiff's complaint, this defendant denies the same.

VIII.

For answer to the allegations of paragraph VIII of plaintiff's complaint, this defendant denies the same.

IX.

For answer to the allegations of paragraph IX of plaintiff's complaint, this defendant denies any knowledge or information thereof sufficient to form a belief.

X.

For answer to the allegations of paragraph X of

plaintiff's complaint, this defendant admits that said place was within the settled residential district of the city, and that the defendant was operating the cars at said place under said Ordinance No. 5874, and that said ordinance provides that:

> "The rate of speed at which cars may be run within [7] the business and settled residential sections of the City shall not exceed twelve miles an hour, and shall be subject to regulation and control by the City Council by ordinance. In case of wilful violation of any ordinance passed in pursuance hereof, the owner or owners of this grant shall be subject to a penalty of one hundred (100) dollars for each violation, said penalty to be recovered by the City of Seattle in a civil action."

But denies each and every other allegation therein contained.

For a further answer and first affirmative defense, this defendant alleges: That whatever injuries, if any, the plaintiff received, were caused and contributed to by his own careless acts and negligence.

For a further answer and second affirmative defense, this defendant alleges: That the plaintiff at the time and place in question was employed by a contractor of and with the City of Seattle in the performance of extra-hazardous work, to wit, in the construction of a manhole in and upon one of the streets of said city, and that the work in which the plaintiff was engaged at the time and place in question was of the extra-hazardous kind covered and included under Chapter 74, Laws of 1911 of the State

of Washington, page 345, relating to compensation of injured workmen; and that whatever injuries, if any, plaintiff received, were received at a time when he was engaged in the employment of an employer carrying on and conducting one of the industries scheduled and classified under such law, and at the plant of such employer, and subject to the provisions of such law; and that, thereafter, to wit, on the 25th day of January, 1913, the plaintiff herein caused to be filed a Workman's Claim for Compensation with the Industrial Insurance Commission of the State of Washington being Claim No. 16,531; and, thereafter, the said Industrial Insurance Commission of the State [8] of Washington awarded the plaintiff herein compensation for the month ending February 23, 1913, of $30.00, and also for the month ending March 23, 1913, of $30.00.

Wherefore, this defendant prays that this action be dismissed and that it recover its costs and disbursements herein.

JAMES B. HOWE,
A. J. FALKNOR,
Attorneys for Defendant.

State of Washington,
County of King,—ss.

A. L. Kempster, being first duly sworn, on oath deposes and says: That he is the Manager of the Puget Sound Traction, Light & Power Company, a corporation, defendant in the above-entitled action; that he has read the foregoing Answer, knows the contents thereof and believes the same to be true. That he makes this verification because defendant

is a corporation and affiant is its manager.

A. L. KEMPSTER.

Subscribed and sworn to before me this 10th day of July, 1913.

R. E. SHARPE,

Notary Public in and for the State of Washington, Residing at Seattle.

Copy of within Answer received and service acknowledged this 10th day of July, 1913.

GATES & EMERY,
Attorneys for Plaintiff.

TO WHOM IT MAY CONCERN:

Notice is hereby given that service of all subsequent papers in the within named action except writs and process, may be made upon defendant by serving the same upon James B. Howe and A. J. Falknor, as attorneys for defendant, at No. 403 Electric [9] Building, Seattle, Washington.

JAMES B. HOWE,
A. J. FALKNOR,
Attorneys for Defendant.

[Endorsed]: Answer. Filed in the U. S. District Court, Western Dist. of Washington. July 10, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [10]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2508.

CHARLES J. SCHLEIF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT and POWER COMPANY, a Corporation,

Defendant.

Reply.

For reply to the answer of the defendant herein, the plaintiff alleges:

I.

As to the first affirmative defense in the answer contained;

He denies the same and every allegation matter and thing therein.

II.

As to the second affirmative defense in said answer contained;

He admits that he was, at the time and place in question, employed by a contractor of and with the city of Seattle, in the construction of a manhole in and upon one of the streets of said city.

He denies that the injuries complained of were received or inflicted upon him at the plant of his employer or by or through the acts or negligence of his employer or any of his servants or employees or by any servants or employees of the city of Seattle.

He denies that said injuries were subject to adjustment or compensation under the Workmen's Compensation Act but alleges that said injuries were inflicted by and arose from the negligence and wrong of another not in the same employment and were received by plaintiff away from and not in or at the plant of his employer and that, if the same were in any way subject to compensation under said [11] act, the plaintiff was entitled to elect and has duly elected not to take under said act but to rely upon his action at law; and that due notice of such election has been given prior to this action to all persons entitled thereto.

Save as above specifically admitted or denied, he denies the allegations of said second affirmative defense and every part thereof.

Wherefore plaintiff prays judgment as in his complaint demanded.

GATES & EMERY,
Plaintiff's Attorney,
422 Central Building, Seattle, Wash.

State of Washington,
County of King,—ss.

Charles J. Schleif, being first duly sworn, says, that he is the plaintiff in the above-entitled action; that he knows the contents of the foregoing reply and believes the same to be true.

[Seal] CHARLES J. SCHLEIF.

Subscribed and sworn to before me this 11th day of July, A. D. 1913.

GEO. D. EMERY,
Notary Public for Washington, Residing at Seattle.

Due and timely service of within this 14th day of July, 1913, and receipt of a copy thereof, admitted.

JAMES B. HOWE,
A. J. FALKNOR,
Attorneys for Defendant.

[Indorsed]: Reply. Filed in the U. S. District Court, Western Dist. of Washington. July 14, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [12]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2508.

CHARLES J. SCHLEIF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation,

Defendant.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff and assess his damages at the sum of $1,470.00, Fourteen Hundred and Seventy Dollars.

K. K. PARKER,
Foreman.

[Indorsed]: Verdict. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jan. 9, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [13]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2508.

CHARLES J. SCHLEIF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation,

Defendant.

Judgment.

The above-entitled action having come on for trial on the 8th day of January, A. D. 1914, before the Honorable Jeremiah Neterer, Judge of said court and a jury duly empaneled and sworn therein; the plaintiff appearing in person and by Geo. D. Emery, his attorney, the defendant appearing by A. J. Falknor, its attorney, and both parties having offered evidence in the cause and the Court having duly charged the jury, the jury having retired on further consideration did on the 9th day of January, A. D. 1914, return into court their verdict, which was duly entered and filed in said court and in said action, in favor of the plaintiff and against the defendant in the sum of One Thousand Four Hundred Seventy Dollars ($1,470.00);

Now, therefore, upon motion of Geo. D. Emery, Esq., attorney for plaintiff, and pursuant to said verdict, it is by the Court considered and adjudged that the plaintiff above named do have and recover from

and of said defendant the sum of one thousand four hundred seventy dollars ($1,470.00) as damages, together with his costs and disbursements herein to be taxed and inserted by the Clerk.

Dated this 13th day of January, A. D. 1914.

By the Court:

JEREMIAH NETERER,
Judge. [14]

Due and timely service of within Judgment this 10th day of January, 1914, and receipt of a copy thereof, admitted.

JAMES B. HOWE,
A. J. FALKNOR,
Attorneys for Defendant.

[Indorsed]: Judgment. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jan. 13, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [15]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2508.

CHARLES J. SCHLIEF,
Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation,
Defendant.

Petition for New Trial.

Comes now the defendant, the Puget Sound Traction, Light & Power Company, and petitions this Honorable Court that a new trial of this action may be granted for the following causes materially affecting the substantial rights of the parties:

I.

Insufficiency of the evidence to justify the verdict of the jury in the following particulars, to wit:

(a) The defendant claims that the evidence given upon the trial of this action was insufficient to establish any negligent act or omission on the part of the defendant or any agent, servant or employee or vice-principal of the defendant, causing, or tending to cause the accident and injury complained of by the plaintiff in his complaint herein, or which was the direct or proximate cause of such accident or injury. Defendant claims that the evidence given at this trial established that the plaintiff was engaged at work at a place where the car of defendant could, and would have safely passed him without occasioning any injury, and that when said car was within a very few feet, and at a time when it was [16] not possible to stop the same, even though it had been going at a rate of twelve miles an hour or less, the plaintiff, either accidentally or carelessly, jumped upon the track and collided with the car.

(b) The defendant claims that the evidence given at the trial of this action showed that the plaintiff's injuries were caused by his own careless acts and negligence. Defendant claims that the evidence es-

tablished in this case that the plaintiff so carelessly or negligently stepped upon short planks, the ends of which were unsupported, and was thereby caused to step or jump on the track over which the street-car was operated, immediately in front of an approaching car and at a time when it was not possible to stop the same and avoid a collision with the plaintiff.

(c) The defendant claims that the evidence given at the trial of this action established that the plaintiff was engaged in that extra-hazardous employment covered by the Workmen's Compensation Act, and that any injuries that he received were received at the plant of his employer and that he was required to look to the State of Washington for any compensation for the injuries received.

II.

Error in law occurring at the trial. The particular errors occurring at the trial relied upon by the defendant in support of this petition are as follows:

(a) The Court erred in denying defendant's motion that the Court instruct the jury to return a verdict for the defendant, for the reason that it appeared from all the evidence in the case that the defendant was not guilty of any negligent act which was the direct or proximate cause of such accident or injury, and for the reason that the evidence showed [17] that said accident and injury were caused by plaintiff's own careless acts and negligence and for the reason that the evidence showed that any claim for compensation that the plaintiff might have was against the State of Washington.

(b) The Court erred in submitting the said action to the jury.

(c) The Court erred in refusing to instruct the jury as follows:

> "You are instructed that the motorman of the car in question had a right to presume that its preference and superior right in the use of its track would be respected by the plaintiff, and the motorman in charge of the car had a right to presume that as the car approached the place where the plaintiff was that the plaintiff would not get upon the track in front of his car, or that if he was on the track or so near that he was in danger of being struck, that he would remove himself off the track and out of the way of danger, and I further charge you that the motorman relying upon such presumption was not required to stop his car or even slacken the speed of his car until the danger of a collision between his car and the plaintiff became imminent."

The defendant requested the above instruction, and duly excepted to the refusal of the Court to give the same, which exception was allowed.

The above instruction was particularly applicable to the facts for the reason that the motorman had the right to assume that the car's preference right to the track would be respected by the plaintiff who was working at a safe distance from the track, and as the motorman approached the place where the plaintiff worked, the plaintiff being at a safe distance from the track, the motorman had a right to assume that the plaintiff would not get on the track in front of

his car and he had a right to rely upon such presumption and was not required to stop his car, or even slacken the speed of the same until the danger of a collision became imminent, and it appearing that the motorman after the [18] danger of a collision became imminent, did all that he could to avoid hitting the plaintiff, but owing to the nearness of the plaintiff to the car at the time he got in front of it, it was impossible to stop the car and avoid the collision.

(d) The Court erred in refusing to instruct the jury as follows:

> "You are further instructed that it was the duty of the plaintiff to use his senses, his eyes and his ears, especially when working in or about a place where a collision with a car was likely to occur, in order to discover the proximity of a passing car of the defendant, and his failure so to do would constitute contributory negligence and prevent any recovery on his part. The law requires one working in or about a street-car track to be on the lookout and to listen for approaching cars, and if you find in this case that the plaintiff failed to look and listen and that had he looked and listened he would have discovered the car, then his failure so to do would constitute contributory negligence and he cannot recover, and your verdict should be for the defendant."

The defendant requested the above instruction, and duly excepted to the refusal of the Court to give the same, which exception was allowed.

The evidence in this case of the plaintiff himself was to the effect that had he looked he could have seen the approaching car for some 900 feet, that he did not look for the approaching car and that he was engrossed with his work and gave no heed or thought to cars. The evidence shows that he was entirely oblivious to his surroundings and that he was guilty of such contributory negligence as to preclude him from recovering herein.

(e) The Court erred in refusing to instruct the jury as follows:

> "I charge you if you find in this case that the plaintiff was standing to the north of the manhole helping a fellow laborer in said manhole, and when said car was in close proximity to him either through the teetering effect of a board, or otherwise, stepped upon the track in front of said car at a time when it [19] was not possible to stop the car and avoid injury, then I charge you that he cannot recover even though the gong on said car had not been previously sounded and even though the speed of said car was excessive, for under such circumstances plaintiff's own conduct contributed to his injury and your verdict should be for the defendant."

The defendant requested the above instruction, and duly excepted to the refusal of the Court to give the same, which exception was allowed.

The above requested instruction was particularly applicable to the facts herein and as neither the speed of the car nor the sounding of the gong under the evidence either was a proximate cause or contributed

to a proximate cause or *contributed to a proximate cause* of the accident, and as the plaintiff stepped upon the track in front of the car at a time when it was not possible to stop the car, therefore the above instruction should have been given and it was error not to do so.

(f) The Court erred in refusing to instruct the jury as follows:

> "I charge you that in this case that the plaintiff was in the employ of a contractor in the performance of work covered and included under the law of the State of Washington relating to compensation for injured workmen, and that he was engaged at such work at the plant of his employer and that under such law relating to compensation of injured workmen plaintiff is required to look to the State of Washington for compensation for injuries received herein."

The defendant requested the above instruction, and duly excepted to the refusal of the Court to give the same, which exception was allowed.

The evidence in this case established that the plaintiff was engaged in the performance of work covered and included in the law of the State of Washington relating to compensation for injured workmen, and was engaged at such work at the plant of his employer, and under such circumstances [20] not being permitted to make an election, and in any event defendant was entitled to have submitted to the jury the question of fact as to whether or not the plaintiff was engaged in such work at the plant of his employer, admittedly he being engaged in work covered

by such act relating to compensation for injured workmen.

(g) The Court erred in refusing to instruct the jury as follows:

> "I charge you that the term 'plant of the employer' in law means the place where the employer is carrying on his work, and in this case if the plaintiff was injured at the place where his employer was carrying on his work, then I charge you that he was injured at the plant of his employer within the terms of the provision of the law relating to compensation for injured workmen, and being at the time engaged in work covered by the said law of the State of Washington relating to compensation for injured workmen, it is your duty to return a verdict for the defendant."

The defendant requested the above instruction, and duly excepted to the refusal of the Court to give the same, which exception was allowed.

The plaintiff admittedly being engaged in the performance of work covered by the law relating to compensation for injured workmen and the only question being involved was whether he was employed at the plant of the employer, which in any event was only a question of fact, the foregoing instruction should have been given and the jury should have been permitted to determine the issue as to whether or not the plaintiff was not engaged in said work at the plant of the employer.

(*b*) The Court erred in instructing the jury as follows:

"You, gentlemen of the jury, fix the standard for reasonable and prudent men under the circumstances in this case as you find them, according to your judgment and experience, or what that class of men would do under the circumstances as detailed by the witnesses and the evidence in this case, taking into consideration [21] all of the circumstances as detailed to you upon the witness-stand and all of the facts and circumstances as disclosed upon the trial, and try it by that standard."

The defendant objects to this instruction particularly for the reason that it allows the jury independent of the rules established by law and decisions to fix the standard for reasonable and prudent men. They must determine under the instructions of the Court defining what constitutes reasonable and prudent care whether or not the plaintiff in this case was exercising such care but it was not competent for the Court to allow the jury to fix their own standard of what constitutes reasonable and prudent care.

(i) The Court erred in instructing the jury as follows:

"The defendant company cannot, however, recklessly run its cars at a speed irrespective of the presence of the plaintiff's employments near its track."

The defendant objects to this particular instruction for the reason that there was no evidence to justify the instruction and for the further reason that no reckless running of the car was proximate or contributed to a proximate cause of the accident, and

therefore was immaterial, and the giving of such instruction tended to confuse and was improper, and that said instruction in effect submitted to the jury the issue of wilful and wanton negligence which was neither raised by the pleadings or evidence.

(j) The Court erred in instructing the jury as follows:

> "You are instructed that the plaintiff, in his employment, upon the street at the point of accident, if you find one did take place, had the right to rely upon the fact that the defendant company would not run its car faster than the limit of speed required by the ordinance, and the motorman operating the car would give the usual warning by ringing a bell or sounding a gong to advise plaintiff of the approach of the car." [22]

The defendant objects to this particularly for the reason that the plaintiff was outside, or beyond the zone of danger and where if he had remained at his usual place of work he would not have been hit by the car, and therefore he had no right to rely upon or expect the ringing of the bell, or that the car would be operated at any particular speed. The defendant company would not be under any obligation of ringing a bell or sounding a gong to advise anyone who was not within the zone of danger or at a place where he would be hit by the passing car. The said instruction is objectionable also for the reason that there was insufficient evidence to raise an issue of fact as to failure of the motorman to sound the gong.

(k) The Court erred in instructing the jury as follows:

> "You are instructed that one of the defenses in this case is that the plaintiff was employed in extra-hazardous work, an employment which comes within the scope of the State Industrial Insurance Act, and that because of the provisions of that Act, he cannot recover in this case. I instruct you that under the evidence as it is presented before you in this case, that the Act does not apply to the issue before you for consideration and that you will entirely disregard such defense on the part of the defendant and determine this case entirely upon the evidence which has been admitted as to the negligence on the part of the defendant, or contributory negligence on the part of the plaintiff, as outlined and defined in these instructions."

The defendant objects to this instruction for the reason that under the evidence in this case, the plaintiff being employed in extra-hazardous work, which comes within the scope of the State Industrial Insurance Commission, being Chapter 74 of the Laws of 1911 of the State of Washington, relating to compensation for injured workmen, and which did apply, and in any event the only question was whether or not he was engaged in such work at the plant of his employer, [23] and in any event this defendant was entitled to have that issue submitted to the jury. Defendant, however, contends that the evidence showed that he was at work at the plant, but if there were any doubt on that issue, the defendant

was entitled to have that issue determined as any other question of fact by the jury.

(1) The Court erred in instructing the jury as follows:

> "You are instructed, however, that if by a fair preponderance of the evidence, you believe that the car was running more than twelve miles an hour at the place of the accident, the burden of proof would, by such act be shifted to the defendant to show by a fair preponderance of the evidence that the injury if one was sustained, was the result of contributory negligence on the part of the plaintiff and that such negligence was the proximate cause of the injury and without which it would not have happened."

The defendant complains of this instruction because it assumes that the speed of the car was the proximate cause of the accident and shifts the burden upon the defendant to show merely from the fact that the car was operated at an excessive speed that the injury resulted from contributory negligence, the law being that the plaintiff must not only establish that the car exceeded the limit fixed by the ordinance, but he must go further and establish that such negligent act was the proximate cause of the accident. The mere establishing of such fact would not be sufficient to establish a *prima facie* case of negligence and shift the burden upon the defendant to establish contributory negligence.

This application and petition for a new trial will be made upon the pleadings in the action and all papers on file, and upon the minutes of the Court

including not only the Clerk's minutes and any notes or memoranda which may have been kept by the Judge, but also the reporter's transcript of his short-hand [24] notes and all exhibits.

JAMES B. HOWE,
A. J. FALKNOR,
Attorneys for Defendant.

Copy of within Petition for New Trial received and service acknowledged this 29th day of Jany., 1914.

G. D. EMERY,
Atty. for Pltf.

[Endorsed]: Petition for New Trial. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Jan. 29, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [25]

[Order Denying Motion for New Trial.]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2508.

CHARLES J. SCHLEIF,
Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER COMPANY,
Defendant.

MOTION FOR NEW TRIAL DENIED.

Filed March 18, 1914.

GEORGE D. EMERY, for Plaintiff.

JAS. B. HOWE, A. J. FALKNOR, for Defendant.

NETERER, District Judge.

I have carefully considered the briefs that have been filed in this case on the motion for a new trial, and am satisfied with the record of the case as made and find no reason that would justify me in granting the motion for a new trial. The motion for a new trial is therefore denied. Exceptions noted.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed in the U. S. District Court, Western District of Washington, Northern Division. Mar. 18, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [26]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2508.

CHARLES J. SCHLIEF,
Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation,
Defendant.

Stipulation [Extending Time to File Bill of Exceptions].

It is hereby stipulated by and between the plaintiff and the defendant that the defendant shall have thirty (30) days from and after the 9th day of January, 1914, within which to prepare, serve and file a Bill of Exceptions herein, and that the Court may enter an order to that effect.

GEO. D. EMERY,
Attorney for Plaintiff.
JAMES B. HOWE,
A. J. FALKNOR,
Attorneys for Defendant. [27]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2508.

CHARLES J. SCHLIEF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation,

Defendant.

Order [Extending Time to File Bill of Exceptions].

The stipulation of the parties for an order extending the time in which the defendant may prepare, serve and file a Bill of Exceptions in the above action, having come on regularly to be heard, and it having been made to appear to the satisfaction of the Court that ten days have not elapsed since the return of the verdict in said action, and that no extension

of time has been previously given or obtained, and the Court having been fully advised in the premises, it is now upon motion of the attorneys for the defendant, and in accordance with the stipulation of the parties, ordered and adjudged that the defendant's time within which to prepare, serve and file a Bill of Exceptions in the above action, be, and the same is hereby extended, and the defendant is allowed thirty (30) days from the 9th day of January, 1914, within which to prepare, serve and file a Bill of Exceptions in the above action.

JEREMIAH NETERER,
Judge.

O. K.—G. D. EMERY,
Attorney for Plaintiff.

[Endorsed]: Stipulation and Order. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jan. 12, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [28]

In the District Court of the United States for the Western District of Washington, Northern Division.

Number ——

CHARLES J. SCHLIEF,
Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation,
Defendant.

Defendant's Proposed Bill of Exceptions.

[29]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. ——

CHARLES J. SCHLIEF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation,

Defendant.

Defendant's Proposed Bill of Exceptions.

FIRST EXCEPTION.

Be it remembered that in the trial of this cause on the 8th day of January, 1914, before the Honorable Jeremiah Neterer, both parties appearing by counsel, the jury was duly impaneled and sworn and at the close of all the evidence the defendant challenged the sufficiency of the evidence to sustain a verdict for the plaintiff, for the reason that the evidence showed that there was no negligence of the defendant that contributed to or was the proximate cause of the injury, and for the reason that the evidence showed that the injuries which the plaintiff received, if any, were caused by his own careless acts and negligence, and for the reason that the evidence showed that the plaintiff must look to the Workmen's Compensation Act of the State of Washington for any relief; and asked the Court to instruct the jury to return a verdict for the defendant.

Such request and motion of the defendant was denied by the Court and to the denial thereof the defendant duly excepted and its exception was allowed. [30*—1†]

The defendant submits the following stenographic report of the trial herein, consisting of pages 1c to 180 inclusive, which is all of the evidence given and received upon the trial of the action, together with all exhibits, being Plaintiff's Exhibits "A" to "H," inclusive, and Defendant's Exhibits 1 to 12, inclusive, referred to and received in evidence as a Bill of Exceptions in support of said first exception. [31—[1a]

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*Page-number appearing at foot of page of original certified Record.
†Original page-number appearing at foot of page of Bill of Exceptions as same appears in Certified Transcript of Record.

In the United States District Court, for the Western District of Washington.

No. ——.

CHARLES J. SCHLIEF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER COMPANY,

Defendant.

Defendant's Proposed Statement of Facts.

APPEARANCES:

For the Plaintiff, Messrs. GATES & EMERY.

For the Defendant, JAMES B. HOWE, Esq., and A. J. FALKNOR, Esq.

BE IT REMEMBERED that the foregoing numbered and entitled cause came on regularly to be heard on the 8th day of January, 1914, before the Honorable Jeremiah Neterer, Judge of the above-entitled court, plaintiff appearing in person and being represented by his counsel, Messrs. Gates & Emery; the defendant appearing by its counsel, A. J. Falknor, Esq.; a jury having been duly impaneled and sworn to try said cause, all parties announcing themselves ready for trial, the following proceedings were had and testimony given, to wit: [33—1c]

(Opening statement by counsel for plaintiff.)

[Testimony of Dr. M. W. McKinney, for Plaintiff.]

Doctor M. W. McKINNEY, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

(Testimony of Dr. M. W. McKinney.)

Direct Examination.

(By Mr. EMERY.)

Q. Doctor McKinney, where do you reside?

A. 5502 14th Avenue Northeast.

Q. In this city? A. Yes, sir.

Q. You are a physician and surgeon?

A. Yes, sir.

Mr. FALKNOR.—I will admit his qualifications.

Q. Did you attend Mr. Charles Schlief, the plaintiff here for an injury that occurred about a year ago? A. I did.

Q. That was very shortly after the injury; within a few minutes? A. Yes, sir.

Q. The injury occurred almost in front of your office? A. Yes, sir.

Q. What was Mr. Schlief's condition; describe what you found upon examination at that time?

A. I found an injury—a fracture of two ribs; a fracture [34—2] of the tibia and fibula—I believe it was the right foot—no, the left foot. He was in an unconscious condition. He remained in this unconscious state for several days, before his mind became clear; rather semi-unconscious.

Q. You say two ribs were broken? A. Yes, sir.

Q. What were they?

A. I don't know as I can tell you exactly. I did not look it up before I came down. The records will show it.

Q. Was he taken to a hospital? A. Yes, sir.

Q. What hospital? A. The Seattle General.

Q. And you treated him there? A. Yes, sir.

(Testimony of Dr. M. W. McKinney.)

Q. How long?

A. He was there, I think about ten days.

Q. Both bones of the left leg were broken?

A. Yes, sir.

Q. Just above the ankle? A. Yes, sir.

Q. Was the ankle bone also broken?

A. I think not. The X-ray plate did not show it.

Q. Was there any dislocation or injury to the foot?

A. The bones were dislocated, yes.

Q. Were any of them worse than dislocated; was there any injury to the tendons of the foot?

A. The tendons were—yes. They necessarily had to be torn in order to let the foot be dislocated. **[35—3]**

Q. Can you state what bones of the foot were displaced?

A. They were all pretty much displaced, that is on the ankle, the astragalus.

Q. That is the large bone immediately under—

A. No, the os calcis.

Q. The os calcis is the heel bone?

A. Yes, sir, and the cuneiform bones—

Q. For the purpose of making it plain to the jury, I will just identify by description, the bones of this foot in the picture. What bone is this to which I point? (Indicating.)

A. That is the cuboid.

Q. I will mark that A?

A. Yes, sir. These are the cuneiform bones; the cuboid and the astragalus and the os calcis.

Q. I will mark them 1, 2 and 3, the cuneiform

(Testimony of Dr. M. W. McKinney.)
bones? A. Yes.

Q. And the astragalus I will mark B?

A. Yes, sir.

Q. And the os calcis C? A. Yes.

Q. Articulating or connecting with these three cuneiform bones are the metatarsal bones forming part of the toes? A. Yes, sir.

Q. The inner part of the toes; these are what you call the phalanges? A. Yes, sir.

Q. Were these metatarsal bones displaced; the four or five bones there? A. No. [36—4]

Q. Only in their connection with the cuneiform?

A. Apparently not displaced at all as far as I could tell.

Q. These bones are all connected by ligaments and cartilages? A. Yes, sir.

Q. And interlaced very intrically across them?

A. Yes, sir.

Q. Holding the foot in place? A. Yes, sir.

Q. To what extent were these cartilages torn from the bone? A. Nobody could tell.

Mr. EMERY.—Mark this Plaintiff's Exhibit "A."

Q. Did you have an X-ray picture taken at that time, of the foot? A. Yes, sir.

Q. Have you got the picture, the plate?

A. No, I have not.

Q. Where is the plate?

A. Doctor Thompson of the Seattle General Hospital—

Q. Did he act in behalf of Mr. Schlief, or was he acting for the Street Railway Company?

(Testimony of Dr. M. W. McKinney.)

A. Well, for the Street Railway.

Mr. EMERY.—Well, I think you had better produce that. Have you that plate?

Mr. FALKNOR.—Well I don't know. Here is one.

Q. I will show you a plate which I will ask the clerk to mark Plaintiff's Exhibit "B." I will show you now this X-ray plate which will be established later was taken day before yesterday by Doctor Snively, of the left foot of Mr. Schlief. Do you recognize any dislocation or displacement of the bones of that foot? [37—5]

A. Well, the arch is down.

Q. Then that results in what you call in Medical Parlance a flat foot? A. Yes, sir.

Q. Will that condition remain and be permanent through life? A. It surely will.

Q. That results from displacement and laceration of those tendons and ligaments? A. Yes, sir.

Q. That result might follow from the condition you found the foot in at the time you examined it?

A. Yes, sir.

Q. How often did you attend the plaintiff there?

A. I saw him twice a day I think the first two weeks and then every day afterwards that he was in the hospital. I do not remember every time I saw him. I saw him several times after he went home.

Q. What was the result of his injury; did the fracture heal? A. Yes, sir.

Q. Made as good a recovery as you could expect?

A. Yes, sir.

(Testimony of Dr. M. W. McKinney.)

Q. The ribs knitted and healed as well as you could expect naturally?

A. Yes, sir. There is a knot or lump on the ribs.

Q. There is a knot or lump on the ribs?

A. Yes, sir.

Q. That was not there before? A. Yes, sir.

Q. That is a result of the injury?

A. Yes, sir. [38—6]

Q. Does that affect his power or working ability or comfort?

A. I haven't heard him say anything about it recently.

Q. As far as you know, would it or would it not?

A. Well, I think not, at present.

Q. The legs—the bones of the legs healed well, did they, the tibia and the fibula? A. Yes, sir.

Q. And the joint at the ankle was all right?

A. Except as to the tendons.

Q. Were the tendons of the joint injured as well as the tendons of the foot; the tendons of the ankle joint injured?

A. The tendons that held the bone, yes; resulting in the flat foot.

Q. You say that in your judgment that injury is a permanent one? A. Yes, sir.

Q. And will remain through life? A. Yes, sir.

Q. Now what is he obliged to do in order to counteract the breaking down of the bones?

A. In my judgment all that can be done is to wear a support both to hold the arch up and a support around the ankle to keep it from spreading.

(Testimony of Dr. M. W. McKinney.)

Q. To hold the arch in place you put a support under it?

A. Put a support under it and then around it to keep it from spreading.

Q. It is necessary for him to wear that always, is it? A. Yes, sir. [39—7]

Q. Even then will it make as strong and perfect a foot as if he had not been injured? A. No, sir.

Q. What is the fact in regard to his liability to suffer pain from that all his life?

A. All figures vary, but he is liable—

Q. What is the effect of that injury as age increases, of becoming more severe; will it or will it not?

A. Well, it will probably become more so, yes.

Q. Who paid you for your services?

A. Mr. Schlief.

Q. Can you state the amount he paid you?

A. He paid me fifty dollars.

Q. Do you know whether he paid the hospital or not. That is not within your knowledge?

A. I don't know.

Mr. EMERY.—That is all.

Cross-examination.

(By Mr. FALKNOR.)

Q. Now, Doctor, on the day of the accident, yourself and Doctor Thompson examined him together?

A. Yes. [40—8]

Q. You made an examination at the hospital?

A. Well, we made one there and I made one at

(Testimony of Dr. M. W. McKinney.)

home before we went to the hospital; where he was injured.

Q. Wasn't the result of your examination about like this; a thorough examination was made when in the hospital, and this showed a little bump on the left side of the forehead with a slight cut of the skin; you found a little bump on the left side of the forehead with a slight cut of the skin; isn't that correct, or do you remember?

A. Well, there was something about that, yes.

Q. He complained of some tenderness on the right side of the chest but neither Doctor McKinney nor I—nor myself could make out any evidence of fracture of the ribs.

Mr. EMERY.—You are not reading Doctor McKinney's testimony?

Mr. FALKNOR.—I am asking him if this was not the result of that examination.

A. Well, the first examination, that is true, but I attended the case afterwards and I found there was a fracture and I strapped it.

Q. Did you take an X-ray? A. Of the ribs?

Q. Yes. A. No, it wasn't necessary.

Q. Well, that would have demonstrated ordinarily whether there was a fracture, would it not?

A. Yes.

Q. But you did not take an X-ray?

A. No. [41—9]

Q. But now you made an examination with Doctor Thompson in the hospital, and neither of you discovered at that time a fractured rib?

(Testimony of Dr. M. W. McKinney.)

A. Well, the man was so near unconscious—

Q. I am asking you, at that time, neither of you could determine that there was a fractured rib, could you?

A. Well, we did not make sufficient examination to swear that there was not.

Q. You took an X-ray of course immediately; either you or Doctor Thompson took an X-ray?

A. Yes, sir.

Q. At the hospital at that time? A. Yes, sir.

Q. In the leg there are two bones below the knee?

A. Yes, sir.

Q. One is called the fibula and the other the tibia? A. Yes, sir.

Q. Which is the larger? A. The tibia.

Q. The tibia is the larger of the two?

A. Yes, sir.

Q. The tibia is—we speak of it as the big bone?

A. Yes.

Q. Between the knee and the ankle?

A. Yes, sir.

Q. And the fibula is the small bone?

A. Yes, sir.

Q. Now about where was the fracture?

A. You have your X-ray plate; let me look at it.

Q. I know, but I am asking you— [42—10]

A. Well, it is hard for one's memory to say just positively about that.

Q. Now, didn't the X-ray show that only the small bone of the leg was fractured?

A. Let me see it and I will tell you.

(Testimony of Dr. M. W. McKinney.)

Q. Well, I have asked for it. There is a fracture in this report of the lower end of the left fibula?

A. How is that?

Q. This report indicates to me as follows: There is a fracture of the lower end of the left fibula. That would be at the smallest part of the small bone, wouldn't it?

Mr. EMERY.—You are reading not from Doctor McKinney's statement—

Mr. FALKNOR.—That is all right. I am asking the Doctor if this is the report made on that day and if it did not indicate after the X-rays were taken that only the small bone of the leg between the knee and the ankle had been fractured.

Q. Now, isn't that true, that only the small bone between the ankle and the knee had been fractured?

A. Show me the X-ray plate.

Q. Then you did not mean to tell the jury that both bones of the leg between the knee and the ankle were fractured?

A. The X-ray plate will tell the truth about that.

Q. But if the X-ray plate shows but that one were fractured then you are willing to accept the X-ray?

A. Yes, sir.

Q. And do you not remember also that the X-ray showed that the bone that was broken was in good position? A. No, sir. [43—11]

Q. Didn't you, when you reduced it, at least put it in good position? A. Yes, sir.

Q. Now you say there were how many ribs broken?

A. Two.

(Testimony of Dr. M. W. McKinney.)

Q. You made a report did you not, Doctor, to the Industrial Commission bearing upon the injuries of the plaintiff? A. Yes, sir.

Q. Did you not, Doctor McKinney, on February 23d, 1913, one month after the accident, make a report to the Industrial Commission bearing upon the nature and extent of this man's injuries?

A. I don't know what the date was.

Q. Well, you saw him regularly from the day of the injury and you treated him as a physician?

A. Yes, sir.

Q. Up until he was discharged, you were his attending physician? A. Yes, sir.

Q. You would have seen him about every day following the injury, would you not, Doctor?

A. Well, about so, yes, I saw him.

Q. A month following the injury you ought to have had a pretty good idea of the nature and extent and duration of his injuries, don't you think?

A. Yes, sir.

Q. Is that your signature (handing witness paper)? A. I guess it is.

Q. Well, it is, isn't it? A. Yes, sir. [44—12]

Q. You made that report to the commission?

A. I suppose I did.

Q. On February 23d, 1913, that is the date of it, isn't it? A. How is that?

Q. On February 23d, 1913.

A. 19—yes, that is what the date says.

Q. If the accident occurred on January 23d, this report was made one month after the injuries?

(Testimony of Dr. M. W. McKinney.)

A. Yes, sir.

Q. One month after you had been treating him?

A. Yes, sir.

Q. Did you not in this report say, "One rib broken"? A. Probably I did; I don't know.

Q. You would have known a month afterwards whether there was one rib broken or two ribs broken, would you not? A. No, I might not.

Q. When did you discover that there were two ribs broken? A. I can't tell you now.

Q. Anyway in this report you stated that one month after the accident that there was but one rib broken? A. I see it there, yes, sir.

Q. Now one month after the accident what did you think was the possibility of any permanent injury. Did you have at that time any idea whether there would be any permanent injury or not?

A. Where?

Q. On the man anywhere. One month afterwards, you should have been able to make up your mind pretty definitely whether there were any permanent injuries or not.

A. Well, it is a little hard to tell in these cases. Sometimes [45—13] you can tell and sometimes you can't. My opinion in this man's case was that there would be, and that is my opinion now.

Q. Now, one month after the accident what did you state to the Industrial Commission about what there would be as to a permanent injury?

Mr. EMERY.—I object to that. The report is the best evidence.

(Testimony of Dr. M. W. McKinney.)

The COURT.—Let him answer.

Q. What did you say as to there being a permanent injury one month after he was injured? You find the question answered there, do you not?

A. I stated here, after three or four months. This question is what you are getting after "In your opinion will any permanent disability follow," and I have answered "I think not." Now, I want to say right here—

Q. That is you did answer—

A. (Interrupting.) Just a minute.

Q. Then you did answer in answer to the question from the Industrial Commission one month after you had been treating the man that you did not think there would be any permanent disability?

A. I said "I think not" but I want to explain that this way. No man can tell that, because no man can tell about these ligaments until the man begins to use them. He had not begun to use them nor did not probably for a couple of months after that.

Q. (By Mr. EMERY.) After this report was made? A. Yes.

Q. (By Mr. FALKNOR.) Did you say anything in any report to [46—14] the commission that the man would have a flat foot?

A. I don't remember whether I did or not.

Q. Well, don't you know that you did not, Doctor?

A. No, sir, I don't know that I did not.

Q. You thought at this time that he would have a disability of three or four months but at that time you did not think he would have any permanent dis-

(Testimony of Dr. M. W. McKinney.)

ability; that was your opinion?

A. That was my impression.

Q. You made subsequent reports to the commission, did you not, Doctor; on March 19th did you send that to the Industrial Commission (handing witness card), that report? A. Yes, sir.

Q. In that report you stated, did you not, that his progress towards recovery was good? A. Yes.

Q. You thought so at that time?

A. Yes, sir, but I want you to remember—

Q. Just a minute now. In this second report you did not modify your report to the commission that you did not think there would be any permanent disability.

Mr. EMERY.—I object to that; he was not asked about any permanent disability. There is nothing on the card indicating any request of that kind.

The COURT.—Answer the question.

Q. In your second report, you did not in any wise modify or qualify your statement that you did not think there would be any permanent disability, did you?

Mr. EMERY.—I object to that, your Honor; there is nothing showing it. It is improper and immaterial. [47—15]

Mr. FALKNOR.—I want to be fair with the Doctor.

The COURT.—Let him answer.

A. I am willing to answer it if you will just let me explain my answer.

Q. Well, you did not, in your report—

(Testimony of Dr. M. W. McKinney.)

A. No, I did not.

The COURT.—Now, you can explain any answer that you desire to make.

A. The point is this: The ligaments are torn; the patient had not begun using his foot and you cannot tell whether the ligaments were torn. That is, as to whether it was going to be a permanent disability until he begun to use them to see how much repair had taken place in the ligaments, and at this time he had not used his foot sufficiently for anyone to tell how much or positively whether those ligaments were going to regain—be repaired sufficiently to hold the arch in place. It was my judgment that they would be and I answered accordingly, but that is not proof that they would.

The COURT.—Let me suggest that that exhibit be identified, and marked.

Mr. FALKNOR.—I haven't yet offered them.

The COURT.—Well, let us keep track of them. They have not been identified.

Q. Now, you did make a report to the commission, did you not after you had discharged him; did you not? A. I don't know whether I did or not.

Q. Look at that.

The COURT.—Let this be marked and let the others be marked.

Q. This one, number one and the next one number two, and then [48—16] this one will be number three. Just look at that and see if that is not a report that you made to the commission a month after you discharged him?

(Testimony of Dr. M. W. McKinney.)

A JUROR.—Pardon me. Ought we not to have the profile of the right foot also to compare the two?

Mr. EMERY.—We will have that profile and pictures and everything else before we get through.

The WITNESS.—You are asking me a question. Mr. Thompson and I put up the foot together. He is your doctor. In fact he did as much of the work as I did in setting it and we advised on the case together in treating it. While it was my case, yet he did not see him after that, but we talked about it, I do not remember how many times, but I reported to him.

Q. I am not asking you about that.

A. In regard to the permanent disability, we could not tell at that time but I simply gave my opinion as I give it to you.

Q. That is on the first exhibit?

A. Well, after the time—now the man's condition now and what has intervened does not have anything to do with it. It is just a waste of time in getting it.

Q. Now, did you not report to the Industrial Commission on or about April 17th, 1913, about four months after the injury; isn't this exhibit identification number three your report?

Mr. EMERY.—I object to that as immaterial.

The COURT.—Let him answer.

Mr. EMERY.—May it be understood that an exception is noted each time an objection is overruled? [49—17]

The COURT.—Yes, sir.

(Testimony of Dr. M. W. McKinney.)

Q. Isn't that the report? A. Yes, sir.

Q. Now, did you not, in this report in answer to a question, answer as follows: "Is patient's progress toward recovery"—still four months afterwards—"A. Yes." A. Yes.

Q. Did you not, in answer to a question "If anything has developed to retard recovery, specify what." "A. No." A. Yes.

Q. Nothing in those four months had developed to retard his recovery?

A. He had not been using it at all.

Q. Have you been treating him since?

A. Not anything only advising him to wear these braces.

Q. You never have given him any treatment since you made this last report to the State?

A. Yes, I have just simply advised him about these braces; that is all that could be done.

Q. But at the end of four months following the injury, you advised the Industrial Commission that nothing had developed to retard his recovery, didn't you?

A. Yes, sir, and as far as I knew there had not.

Q. At that time you had discharged him, or a month previous to this report; he had been discharged about a month? A. Yes, sir.

Mr. EMERY.—Are these offered in evidence?

Mr. FALKNOR.—Yes, we will offer these three exhibits in evidence and ask that they be marked respectively, Defendant's Exhibits 1, 2 and 3. [50—18]

(Testimony of Dr. M. W. McKinney.)

Mr. EMERY.—I have no objection. Put them in.

The COURT.—Admitted.

(Exhibits in question received in evidence and marked Defendant's Exhibits 1, 2 and 3 respectively.)

Q. When did you discover he had two ribs broken?

A. I couldn't tell you.

Q. You never changed your original statement to the State that he had but one rib broken?

A. I could not tell you about that.

Q. In no report that you made to the State did you say anything about a flat foot, did you?

A. No, sir.

Q. And you never treated him for a flat foot once?

A. I have advised him, yes; told him to wear the arch braces.

Redirect Examination.

(By Mr. EMERY.)

Q. You could not tell from the examination of the foot at that time what the extent of the injury would develop [51—19] three or four months afterwards?

A. We could not tell whether it was going to hurt him or not. The mere fact that when he first got up it naturally would be sore; his report to me was that he was getting along very good and we simply sent in the reports that we saw, but as time went along you see what it has come to.

Q. Did you make any other X-ray picture from the one taken at the time Doctor Thompson was there? A. No, sir.

Q. You cannot tell the exact extent of the dislo-

(Testimony of Dr. M. W. McKinney.)

cation of the bones without the X-ray, could you?

A. No, sir.

Mr. FALKNOR.—Don't lead the witness.

Q. This report is in evidence. Just let us read it.

Mr. FALKNOR.—I will state that these are the original files of the Industrial Commission that we have offered; we have certified copies and after the case is over I would like to substitute certified copies so that the originals may be returned.

The COURT.—Certified copies may be substituted.

(Mr. Emery reads exhibits referred to to the jury.)

Q. Did you make a subsequent report that you recall after discovering the extent of the injury as to its permanency?

A. I do not recall anything only those cards.

Q. Were you asked to make any other report or any report later after you discovered the extent of the injury?

A. Well, the Industrial Commission sends slips for reports.

Q. Such as these numbers two and three?

A. Yes, sir, that is all. [52—20]

Q. Did you get any others besides those two?

A. I do not remember if I did.

Q. I notice in Exhibit Two, you state in your opinion, this being dated March 22d,—you state that in your opinion it would be about a month before he could be discharged at that time? A. Yes, sir.

Q. At whose request was the X-ray picture taken?

A. Well, I think I requested it and we both agreed to it.

(Testimony of Dr. M. W. McKinney.)

Q. Who took it? A. Doctor Thompson took it.

Mr. EMERY.—That is all.

Mr. FALKNOR.—That is all.

(Witness excused.) [53—21]

[Testimony of Charles J. Schlief, in His Own Behalf.]

CHARLES J. SCHLIEF, the plaintiff, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. EMERY.)

Q. Are you the plaintiff in this case?

A. Yes, sir.

Q. State your name. A. Charles J. Schlief.

Q. How old are you, Mr. Schlief? A. 43.

Q. This accident happened on January 23d, 1913; how old were you at that time? A. 42.

Q. Are you married or single? A. Married.

Q. What were you doing on the 23d of January, 1913—how were you employed?

A. I was working for Krog and Jessen.

Q. In what employment; what business?

A. Working on the street; putting in a box—a catch-basin, chamber.

Q. What was their general business, contracting?

[54—22] A. Contracting; street work.

Q. At that time was there any work being done on 14th Avenue northeast near 55th Street?

A. Yes, sir.

Q. What work was being done there?

(Testimony of Charles J. Schlief.)

A. Building a gate-chamber.

Q. That was city work, was it?

A. Why, it was city work; yes, sir.

Q. What contractors were doing the work?

A. Krogh & Jessen.

Q. Were you working for Krogh & Jessen?

A. Yes, sir.

Q. Where were you at work at the time this accident happened?

A. Between 55th Street and 14th Avenue.

Q. On 14th Avenue? A. Yes, sir.

Q. Does this picture—have you looked at this map; does this picture where the round circle is—

A. Yes, sir.

Q. (Continuing.) —indicate where the accident occurred? A. Yes, sir.

Q. Is that the point where the catch-basin was being put in, or what is it? A. A gate-chamber.

Mr. EMERY.—It may be understood that this map which is referred to here may be marked Exhibit "C." We offer it in evidence. I assume it to be correct. Counsel has had it made.

The COURT.—Is there any objection? **[55—23]**

Mr. FALKNOR.—No objection.

The COURT.—Admitted. That is the plat.

(Plat in question received in evidence and marked Plaintiff's Exhibit "C.")

Q. The point with the center of the circle in the plat is the place where the water-gate was?

A. Yes, sir.

Q. What was the size of the hole dug there to in-

(Testimony of Charles J. Schlief.)

sert that water-gate?

A. About 6 feet in diameter; 5 or 6 feet deep.

Q. How was the surface of the street on that side; the east side of the street there?

A. Well, it was all tore up.

Q. Was it paved?

A. It was partly paved but right where the hole was it was not.

Q. It was open there where the hole was?

A. Yes, sir.

Q. What was there on the opposite side of the street? A. It was paved.

Q. And what part of the paving had been taken up here along the entire east side of the avenue there; 14th; the top or concrete base?

A. The concrete base.

Q. The concrete base remained there and the top was taken off? A. Yes, sir. **[56—24]**

Q. Was there a crossing from the east side of the avenue across to the track or how did the passengers or pedestrians come along 55th to get across the track? A. We had some planks laid across there.

Q. Some planks laid across there? A. Yes, sir.

Q. This hole you say was 6 feet wide and 5 feet deep? A. Yes, sir.

Q. How far from the north edge of the hole was the planks?

A. Well, it laid right alongside of the hole.

Q. Between the hole and the crossing planking,—was there any platform or place—receptacle for waiting people up there? A. I don't know.

(Testimony of Charles J. Schlief.)

Q. How was that space occupied between the planks and the side of the hole; cross-planks; was there any space there at all?

A. No, nothing but planking, but the platform.

Q. What did the ends of those planks rest on?

A. They were laying on the dirt.

Q. On the surface?

A. No, on the dirt; around the hole.

Q. Was there a space underneath the planking down to the concrete, or did they lay flat on the ground?

A. No, they did not lay on the ground at all. They stuck out over the hole.

Q. What was it, the plank or the ends of the ties sticking over the hole?

A. Well, the end of the ties and the planking both.

Q. The ends of the ties from the street railway stuck over **[57—25]** the hole? A. Yes, sir.

Q. How far was the edge of the hole from the nearest rail—the edge of the water-gate hole from the nearest rail? A. Oh, not very far.

Q. Well, about? A. About two feet.

Q. You think it was about two feet?

A. Yes, sir.

Q. The ends of the ties must have stuck out two feet then if they stuck out over the hole?

A. Yes, sir.

Q. Whatever that was, are you sure that the ties projected over the hole? A. Yes, sir.

Q. What were you engaged in doing?

(Testimony of Charles J. Schlief.)

A. Helping build that gate chamber; I was passing down brick.

Q. You were passing down brick? A. Yes, sir.

Q. Was there a man in the hole building the chamber? A. Yes, sir.

Q. Who was that? A. Mr. Kromm.

Q. You were his helper passing down brick to him? A. Yes, sir.

Q. Where did you go to get the brick?

A. Up on the side street.

Q. Up here (indicating)?

A. Yes, sir. **[58—26]**

Q. At the point marked A? A. Yes, sir.

Q. Near this corner or back from it?

A. Back from it.

Q. Were the brick piled on the sidewalk or on the street? A. Piled on the parking strip.

Q. Outside of the sidewalk? A. Yes, sir.

Q. Would this point indicate it (indicating)?

A. That is about it.

Q. I will mark it B for brick. I wish you would come down here and show the jury substantially the course you followed when you took your brick from this pile over to the hole; where did you stand?

A. Here (indicating).

Q. Between the hole and the brick?

A. Yes.

Q. At the time you were struck by the car what were you engaged in doing; just that particular time?

A. Well, I must have been passing down brick.

(Testimony of Charles J. Schlief.)

Q. Was your attention engaged upon that work?

A. It certainly was.

Q. Watching the mason in the hole?

A. Yes, sir.

Q. You had to supply the brick to him just as he needed them? A. Yes, sir.

Q. Now did you hear this car approaching you?

A. No, sir.

Q. Did you hear any bell sounding?

A. No, sir. **[59—27]**

Q. Or any gong sounding? A. No, sir.

Q. Or any other alarm? A. No, sir.

Q. Between the rails at that point was the street paved? A. Yes, sir.

Q. Level with the top of the rail? A. Yes, sir.

Q. I will ask you what, if anything, there was on the south side of that hole? A. There was dirt.

Q. What dirt was it?

A. The dirt from the hole piled up.

Q. The dirt that came out of the hole was shoveled up on the south side? A. Yes, sir.

Q. Did they use to cover that hole at night when they left it? A. Yes, sir.

Q. What did they cover it with? A. Ties.

Q. What did you do with the ties that day?

A. Piled them up there too.

Q. Piled them up on the dirt? A. Yes, sir.

Q. How far is this track straight in a southerly direction towards town from where you stood?

A. I judge about three blocks.

Q. Could you see all that distance?

(Testimony of Charles J. Schlief.)

A. Yes, sir. **[60—28]**

Q. See a car coming? A. Yes, sir.

Q. The man on the car at that distance could see you then could he? A. Yes, sir.

Q. Which direction was the car going that struck you? A. Going north.

Q. That is in this direction (indicating)?

A. Yes, sir.

Q. Which track was it traveling on, when it struck you; on the east or west track?

A. On the east track.

Q. Going north on this track? A. Yes, sir.

Q. How long had you been working there at that hole; how many days?

A. Why, I had just started there that morning.

Q. The hole was dug that morning?

A. No, the hole was dug the day before.

Q. Had they been doing work right along in that neighborhood; that kind of business along that track before? A. Yes, sir.

Q. Had you known of the cars passing there at frequent intervals? A. Yes, sir.

Q. Where were you when you were struck by the car, do you know?

A. I don't know.

Q. Are you able now to state where you were standing and what you were doing at the moment you were struck by that **[61—29]** car?

A. No, sir.

Q. What is your first recollection after that?

A. My first recollection was in the hospital.

(Testimony of Charles J. Schlief.)

Q. Then the fact that you were struck and carried across the street and picked up and taken to the doctor's office and examined and taken to the hospital and treated for several days, you don't know anything about it? A. No, sir.

Q. How did you find yourself to be injured, if you were injured; state to the jury where you were hurt and what was the matter?

A. Well, after I came to in the hospital, I was all laced up and my leg in a plaster cast; they told me I had been struck by the street car.

Q. That is the first you knew what hurt you?

A. That is the first I knew what hurt me.

Q. Well, how were your ribs; did you have any trouble with your ribs. A. Yes.

Q. Which side? A. Right in here (indicating).

Q. Just stand up here and show the jury where you were hurt?

A. Right there (indicating).

Q. Just take your coat right off.

(Witness does as directed.)

Q. Right in there (showing)?

A. Right in there.

Q. Through the breast on the front side?

A. Yes, sir. **[62—30]**

Q. Did you have any pain back here (indicating)?

A. Not as much as in front.

Q. Did you have some back there?

A. Yes, sir.

Q. Where did you find yourself to be bandaged at that time; where were the adhesive plasters?

(Testimony of Charles J. Schlief.)

A. All around.

Q. On the front and back? A. All around.

Q. Which leg was it that was broken?

A. Right here (indicating left leg).

Q. Where was the break?

A. Just above the ankle.

Q. What shape was your foot in?

A. It was all—

Q. Was that also in a cast?

A. It was also in a cast, yes, sir.

Q. Did you suffer any pain?

A. I did, for quite a while.

Q. How long did you remain in the hospital?

A. 10 days.

Q. Where did you go from there?

A. I went to my home.

Q. How did you get home?

A. Doctor McKinney took me home.

Q. In the automobile? A. Yes, sir.

Q. How long did you stay in bed after that?

A. About two months.

Q. Before you were able to be up? **[63—31]**

A. Yes, sir.

Q. How long was it before you were able to get around? A. About three months.

Q. Then were you able to walk naturally as you always did or did you have to use a crutch or stick?

A. I used crutches.

Q. How long did you go with a crutch?

A. Oh, 6 weeks or so.

Q. Has your foot ever recovered as good as it was

(Testimony of Charles J. Schlief.)

before? A. No, sir.

Q. What is the matter with it?

A. It is always paining me.

Q. Whereabouts is the pain?

A. Right in there, through there (indicating top and inside of ankle).

Q. Take off your shoe and stocking and show it to the jury. While you are doing that, just state to me whether the bones of your leg above the ankle subsequently recovered all right; did they?

A. Why it don't seem to bother me so much.

Q. Is that the brace the doctor provided for you to wear? (Indicating leather brace.)

A. Yes, sir.

Q. Now, is this extra substance placed in the bottom of the shoe, is that what was prescribed by the doctor? A. Yes, sir.

Q. To hold up your foot? A. Yes, sir.

Mr. EMERY.—I want to show that to the jury. I cannot offer the shoe in evidence very well.

Mr. FALKNOR.—I would ask the witness to take off the other **[64—32]** shoe as well.

Mr. EMERY.—Yes, we will show both feet.

Q. This support—this portion of it is the support that is put into the shoe (indicating)? (Support shown jury.) A. Yes, sir.

Q. Now, show the jury on your foot where it hurts you when you stand on it.

A. Right through here (indicating inside and top of left ankle).

Q. Do you have pain there when you are not

(Testimony of Charles J. Schlief.)
standing, or only when you press the foot?

A. When I have got my shoe on and got it laced up it isn't so bad but when it is barefooted—

Q. How about it when you lie in bed?

A. Oh, it rests pretty easy.

Q. Does it pain you when you take your shoe off?

A. All the time.

Q. Take the support away?

A. Yes, sir, I most generally always press it against the other foot to go to sleep.

Q. Where was the break here on your foot?

A. Right through here (indicating lower end of fibula).

Q. Was there any soreness around the bones on this side? A. Yes, sir.

Q. At the point here (indicating)? A. Yes, sir.

Q. How long did that continue?

A. Oh, it gets sore yet if I do not wear the brace.

Q. How about the bones around here (indicating), is that sore? A. Well, it isn't so bad.

Mr. FALKNOR.—I would like to have him stand up and have the [65—33] jurors examine the condition of the feet.

Mr. EMERY.—I intend to call some surgeons who examined him, this afternoon, and they will explain the exact condition of the man's foot. I will call them immediately this afternoon.

Mr. FALKNOR.—You have no objection to this standing up to show the jury whether or not there is any apparent difference in the flatness in his feet?

Mr. EMERY.—No, sir, I would like to have the

(Testimony of Charles J. Schlief.)

jurors come and examine his feet.

Q. Stand with your weight on that left foot. (Witness does as directed.)

Mr. FALKNOR.—Turn around so we can see whether there is any difference in the other foot. Put your weight on this foot. (Witness does as directed.)

Q. That pain still continues, does it?

A. Yes, sir.

Q. All this time? A. Yes, sir.

Q. Did you suffer pain just now when you were standing on that foot? A. Yes, sir.

Q. Mr. Schlief, have you any trade?

A. Well, I mostly work at carpenter trade.

Q. What do you earn—what did you earn when you were in possession of your full faculties and were working regularly?

A. Three and a half and four dollars.

Q. During the time, and since January 23d, 1913, how much of the time were you able to work; how much of the time [66—34] were you unable to work on account of this injury?

A. Well, ever since I went to work, for a while I worked in a gravel pit until I went to work at form building on the street again.

Q. How long were you out of work on account of the injury? A. About four months.

Q. Were you able to work as well when you went back as you were before you were hurt?

A. No, sir.

Q. Have you been able to work as well since you

(Testimony of Charles J. Schlief.)

were hurt as you were before? A. No, sir.

Q. Did you ever suffer pain in your foot before you were hurt? A. No, sir.

Q. Have you suffered it all the time since?

A. I have suffered it all the time since.

Q. I will ask you if you had a talk with the street-car company's agent about your injury before this action was commenced.

Mr. FALKNOR.—I object to that as immaterial.

Mr. EMERY.—The statute says we have a right to elect whether we will take in a case of this kind where we are hurt away from the plant of the employer by a third party—we have a right to elect whether we will take from the Industrial Insurance Commission or from the third party, but notice of that election must be given before suit is brought.

The COURT.—He can answer yes or no.

A. I have. [67—35]

Q. Who did you talk with?

Mr. FALKNOR.—I object as immaterial.

The COURT.—He may answer.

A. I don't know who the man was. I went up to the office.

Q. Where was it?

A. Up in the electric company's building; their office.

Q. At the office? A. Yes, sir.

Q. What did you say when you went in there.

Mr. FALKNOR.—Notice of election is not given to us in any event. It is given to the State, and so it is immaterial entirely.

(Testimony of Charles J. Schlief.)

Mr. EMERY.—It does not appear in the statute which one.

(Argument.)

The COURT.—Was it written notice or oral?

Mr. EMERY.—No, sir, no written notice given to the company. I will find out. I don't know.

Mr. FALKNOR.—Well, since the statute in no way requires it—

Mr. EMERY.—Well, if you will waive it.

Mr. FALKNOR.—I do not waive it. I object to it as immaterial.

Mr. EMERY.—If the objection is construed as a waiver I have nothing more to say about it.

The COURT.—I am frank to say myself that I do not believe the defendant is entitled to the notice of election. The State is the one that is required—because there are certain other provisions in the law which the Industrial Commission requires.

Q. Did you give these people any written notice that you would take your damages from them, the street-car company? [68—36] A. No, sir.

Q. You did, however, talk with their claim agent? A. Yes, sir.

Q. In their office? A. Yes, sir.

Q. Did you tell him that you claimed your damages from them?

Mr. FALKNOR.—I object to that as suggestive and leading.

Q. Yes. What did you state to him, if anything, with regard to claiming damages for your

(Testimony of Charles J. Schlief.)

injury, as to whom you would claim your damages from?

The COURT.—As stated a moment ago, I do not believe it is material but I will let him answer so as to avoid any error.

A. Every time I went up there they was talking Industrial Insurance Commission to me.

Q. What did you tell him about it?

Mr. FALKNOR.—I object as immaterial.

A. I didn't go up there to see him about it.

Q. You told him you did not come up there to see him about that? A. Yes, sir.

Mr. FALKNOR.—I object to that as immaterial.

The COURT.—The same ruling.

Q. What did you tell him?

A. I told him I came to see what they would do.

Q. You wanted the company to pay?

A. Yes, sir.

Q. Did you pay anything for your treatment in the hospital, other than what you paid the doctor?

A. Yes, sir.

Q. How much did you pay for that? [69—37]

A. Well, I can't say just what I paid.

Q. Well, about.

A. I think it was about $20.

Q. To the hospital? A. Yes, sir.

Q. Did you have to have medicines other than what you paid the doctor? A. No, sir.

Q. Did you pay the doctor for any further treatments after that besides the $50? A. No, sir.

Q. That covered the whole treatment?

(Testimony of Charles J. Schlief.)

A. Yes, sir.

Mr. EMERY.—I think that is all at this time.

(At this time a recess was taken until two o'clock P. M.) [70—38]

(Upon reconvening at two o'clock P. M., the following proceedings were had.)

CHARLES J. SCHLIEF on the stand.

Direct Examination (Resumed).

(By Mr. EMERY.)

Q. I show you a picture, which is marked Plaintiff's Exhibit "D" and ask you if that is a picture of the place where the accident happened as it appears at this time. A. I think so.

Q. The manhole that appears immediately behind where the man is standing is at the point where the trouble occurred? A. Yes, sir.

Q. That is its present condition? A. Yes, sir.

Q. At the time of the accident was the left side of the street, or the left side of this picture in its condition as it is now? A. No, sir.

Q. It was unpaved then?

A. It was unpaved then.

Q. But the right side of the track was paved? [71—39] A. The right side was paved.

Q. The place where the man was standing would have been in the hole? A. Yes, sir.

Mr. FALKNOR.—Don't lead the witness quite so much.

Q. How far out did these ties extend from the rail? A. Right on the edge of the hole.

Q. Right on the edge of the hole.

(Testimony of Charles J. Schlief.)

A. The rail was about the edge of the hole.

Q. The hole extended back practically under the ties? A. Back under the ties.

Q. Then as it—the brick work—was brought up, was it arched at the top? A. Yes, sir.

Q. The manhole was in the center of the hole as it appears here? A. Yes, sir.

Mr. EMERY.—We offer this in evidence.

Mr. FALKNOR.—No objection.

The COURT.—It may be admitted.

(Picture in question received in evidence and marked as Plaintiff's Exhibit "D.")

Q. In your testimony this morning you said you thought you paid the hospital $20. Have you since refreshed your recollection about that?

A. It was somewheres between $20 and $30; somewheres along there.

Q. Between twenty and thirty?

A. Yes, sir. [72—40]

Q. Do you know what their charge is per week?

A. I do not.

Q. You were there ten days?

A. $20 a week.

Q. You paid them at that rate for the time you were there? A. Yes, sir.

Cross-examination.

(By Mr. FALKNOR.)

Q. How long had you worked at the place where the accident happened? A. Just that day.

Q. That day? A. Yes, sir.

Q. How long had you been in the employ of

(Testimony of Charles J. Schlief.)

Krogh and Jessen?

A. Between three and four months.

Q. Engaged in working on public improvements?

A. Yes, sir.

Q. Now, the accident happened something like about 10:20 that day, didn't it? A. Yes, sir.

Q. So you had gone to work at what time in the morning? A. Eight o'clock. **[73—41]**

Q. You had worked there at that place up until the time of the accident? A. Yes, sir.

Q. Now, you were assisting putting in this air shaft or manhole? A. Yes, sir.

Q. That was a part and parcel and is a part and parcel of the city water works? A. Yes, sir.

Q. And was connected with one of the city water mains? A. Yes, sir.

Q. That is in the street in that place?

A. Yes, sir.

Q. How long had you lived in the city previous to that time; the city of Seattle; about how long?

A. Living in the city, do you mean?

Q. Yes, how long had you lived in the city?

A. Oh, about eight years.

Q. Going back to the accident, I asked you about before; you said you had been working for Krogh & Jessen, contractors for the city, in the same kind of work for three or four months?

A. Yes, sir.

Q. You had assisted in similar work on the same street? A. Yes, sir.

Q. About how many air shafts or man holes had

(Testimony of Charles J. Schlief.)
you assisted in putting in on the same street?

A. Why, that was the first one.

Q. That was the first one?

A. Yes, sir. [74—42]

Q. But you had been working on the same street?

A. Working on the same street.

Q. What was the line of your work previous to that time?

A. Well, we put in catch basins. This was supposed to be a gate chamber of the water main and these others were catch basins.

Q. You had been working for some considerable time on the same street? A. Yes, sir.

Q. Now, Mr. Schlief, during that time and during the time you had been working on the street for several months previously, the street-cars were operating over the double track? A. Yes, sir.

Q. The cars going outbound or north bound on the easterly most track and the inbound cars on the westerly tracks? A. Yes, sir.

Q. They had been operated that way during the time you had been working there? A. Yes, sir.

Q. That is quite a trunk line, isn't it?

A. Yes, sir.

Q. And cars pass quite frequently over that line?

A. Yes, sir.

Q. Now, I understand that at the place where the accident happened, you could see in the direction from which the car came that hit you, about three blocks? A. Yes, sir.

Q. Assuming that there are three hundred feet to

(Testimony of Charles J. Schlief.)

the block, then you could see something like 900 feet? [75—43] A. Yes, sir.

Q. Did you see this car? A. I did not, sir.

Q. Did you hear this car? A. I did not.

Q. You had not looked then, from the time the car came in view until you were hit? A. No, sir.

Q. You had not? A. No, sir.

Q. Your mind was engrossed with your work; you were thinking about your work? A. Yes, sir.

Q. And you were not thinking about the car?

A. No, sir.

Q. Now, let us see if I get the situation in mind definitely, Mr. Schlief. Your part of the work was to carry the brick from B over to the manhole?

A. Yes, sir.

Q. And it was the duty of the man working in the manhole to lay the brick? A. Yes, sir.

Q. It was the duty of the other man who was assisting to mix the mortar? A. Yes, sir.

Q. The brick were over at B? A. Yes, sir.

Q. You brought the brick from B over to the manhole? A. Yes, sir.

Q. And then you would go back to B and get some more brick? [76—44] A. Yes, sir.

Q. Your line of duty was from the manhole to B and from B to the manhole?

A. And around the hole.

Q. But all you did was to hand the brick down to the man in the manhole? A. Yes, sir.

Q. How did you carry the brick across?

(Testimony of Charles J. Schlief.)

A. Why, I wheeled them down to the edge of the hole.

Q. Wheeled them down to the edge of the hole with a wheelbarrow? A. Yes, sir.

Q. Then you lifted the brick out of your wheelbarrow?

A. Well, that time we dumped them out there and then we picked them out as we used them.

Q. You picked them up as you used them and then handed them to the man in the hole? A. Yes, sir.

Q. When you got the wheelbarrow load handed to the man in the hole you would go back to B and get more brick? A. Yes, sir.

Q. You had been working there for a couple of hours that morning doing that? A. Yes, sir.

Q. Now, if I understand correctly, this is the inbound track and from this track to the sidewalk the paving was complete. That is, the concrete was in and the asphalt was on top? A. Yes, sir.

Q. Well, from the westerly track to the sidewalk? [77—45] A. Yes, sir.

Q. And from this rail, that is the westerly rail of the inbound track to the easterly rail of the outbound track, and for a distance of a foot and a half on each side which the company is obligated to pave, the concrete foundation only was in? A. Yes, sir.

Q. The concrete foundation was in beyond the easterly rail something like a foot and a half?

A. Not at the hole.

Q. (By Mr. EMERY.) Not at the hole, you say?

A. No, sir.

(Testimony of Charles J. Schlief.)

Q. Do you know how far the center of this hole is from the east rail? A. I do not.

Q. Have you ever measured it? A. No, sir.

Q. Don't you know that it is four feet, four and a half inches? A. I don't know.

Q. If it is four feet, four and a half inches—the center of the hole from the east rail, would you tell the jury that the company had not laid this concrete base a foot and a half beyond the easterly rail of the outbound track? A. Yes, sir.

Q. You would still say so? A. Yes, sir.

Q. Well, the ties project about two feet beyond the track, do they not? **[78—46]**

A. Well, I don't know about that.

Q. You don't know about that? A. No.

Q. Now, going a little further; that portion of the street that the city was obligated to pave and did pave beyond the easterly rail of the outbound track—there was no concrete in at all at that time out there, but it would simply would have been excavated so that the concrete could be laid? A. Yes, sir.

Q. But there was no concrete in? A. No, sir.

Q. So that extending within that—that portion east of the outbound track had been excavated; simply the dirt taken out? A. Yes, sir.

Q. Between the rails and between the tracks the concrete was in and on the opposite side of the street it had been completed and the asphalt on?

A. Yes, sir.

Q. At the time of the accident? A. Yes, sir.

Q. Now, will you step down here and let us see.

(Testimony of Charles J. Schlief.)

I have a diagram here. Where was the mortar-box —was there any mortar-box on 55th north of the manhole? A. Yes, sir.

Q. In the vicinity of where I am pointing?

A. Well, it was somewhere there.

Q. Well, we will mark that M. That is the mortar-box near the center of the street? [79—47]

A. Yes, sir.

Q. Now, you notice just north of the manhole a number of—was there not a number of short boards three or four feet long from the east rail of the easterly track to the sidewalk; just to the north of the manhole over which your wheelbarrow came?

A. I don't know about that; I don't think there was anything there.

Q. Weren't there boards three or four feet long extending from the east rail to the sidewalk?

A. No.

Q. What was there?

A. I don't think there was anything there.

Q. How did you get your wheelbarrow down?

A. We dumped our brick way over here (indicating).

Q. And then carried them over? A. Yes, sir.

Q. Weren't there a number of short boards for passengers to get off the car and on the car and walk across that place?

A. There might have been before we started to work there.

Q. Weren't there at the time you worked there?

A. Not that I know of.

(Testimony of Charles J. Schlief.)

Q. Not that you know of? A. No, sir.

Q. Did you not notice that in excavating for the hole that you had excavated underneath the ends of those short boards and that those short boards extended somewhat over the excavation underneath; did you notice that?

A. Well, I did not notice— [80—48]

Q. But the boards that were there, didn't they extend a short distance—the ends of them a short distance over that excavation?

A. Well, I couldn't swear about them planks being there at all.

Q. Will you swear those planks were not there?

A. They might have been there.

Q. Well, you were there and you ought to know whether there were planks there or not; weren't there short planks there just about as I have indicated on this diagram? A. I don't know.

Q. You won't say whether there were or were not?

A. No, sir.

Q. Will you say whether or not someone had excavated preparatory to putting in this air shaft, the dirt underneath the ends of those planks?

A. No, sir.

Q. You won't say whether that happened or not?

A. I don't know.

Q. Anyway you would dump the brick from your wheelbarrow over about where I mark X?

A. At the corner.

Q. And then you would carry the brick from X over to the manhole? A. Yes, sir.

(Testimony of Charles J. Schlief.)

Q. And then you would go back and get some more brick? A. Yes, sir.

Q. Your course then was from the manhole to the brick? A. Yes, sir. [81—49]

Mr. FALKNOR.—I now offer this in evidence and ask that it be marked as Defendant's Exhibit 4.

Mr. EMERY.—No objection.

The COURT.—Admitted.

(Diagram in question received in evidence and marked as Defendant's Exhibit 4.)

Q. Now, let me ask you this: If this is not a fact, taking this exhibit that I have just called your attention to, while you were engaged in handing the brick down to the man that was working in the hole at that time, you were standing approximately just to the north of the center of the manhole. That is right, isn't it? A. Yes, sir.

Q. And you stepped out onto the end of one of those teetering boards and lost your balance and jumped over onto the track and at that instant the car came down and struck you, isn't that true?

A. Well, that is something I can't say for I didn't see the car.

Q. Would you say that it is not true?

A. I wouldn't say whether it was or was not.

Q. You wouldn't say whether it was or was not? Well, now, let us see. You presented a claim to the State didn't you; you presented a claim to the State soon after the injury did you not, Mr. Schlief?

A. Yes, sir.

Q. Is that your signature? (Hands witness

(Testimony of Charles J. Schlief.)

paper.) A. (No response.) [82—50]

Q. You don't deny your signature do you; isn't that the claim that you presented to the State?

A. I think it is.

Q. Did you not in this—

The COURT.—Let that be marked for identification.

Q. Calling the witness' attention to this identification number 5, I will ask you if you did not, over your own signature, on the 25th day of January, 1913, in the presentation of your claim to the State, in answer to the question which says, "Describe in full how the accident happened," state "Was working alongside car track and made a misstep and got in front of street car." Did you not so describe the accident? A. Yes, sir.

Q. What misstep did you make; you stepped on the teetering board and that caused you to start to fall and you jumped on the track in front of the car just as the car came along. That is it, isn't it?

A. Well, it might be it.

Q. Well, it is, isn't it?

A. Well, I can't say if them boards was there.

Q. Well, what caused you to make that misstep and jump in front of the car that you refer to in your own description, you don't know? A. Yes, sir.

Q. Now, you received from the State after you had presented this claim, two warrants, did you not?

A. Yes, sir.

Q. What did you do with them?

A. I kept them. [83—51]

(Testimony of Charles J. Schlief.)

Q. You kept them? A. Yes, sir.

Q. You have got them now, haven't you?

A. Yes, sir.

Q. You received $30 for the month of January, 1913? A. No, sir. I never received anything.

Q. Well, you received two warrants?

A. Yes, sir.

Mr. EMERY.—Well, he didn't get two warrants.

Mr. FALKNER.—Well, he says he did.

Q. And you have got them now?

A. They had to be signed.

Q. Speak a little louder; you have got them now?

A. Yes, sir.

Q. The State asked you to return them, didn't it; and you didn't do it? A. No, sir.

Q. You have still kept them? A. Yes, sir.

Q. And you had them at the time you started this suit? A. Yes, sir.

Q. You have had them all the time since, haven't you? A. Yes, sir.

Q. They were each in the sum of $30?

A. Yes, sir.

Q. They were paid to you because of the claim you presented to the State?

A. They never was paid to me.

Q. They were delivered to you, weren't they?

A. Yes, sir.

Q. They were delivered to you because of the claim you presented [84—52] to the State, isn't that right? A. I guess so, yes, sir.

Q. How is that? A. Yes, sir.

(Testimony of Charles J. Schlief.)

The COURT.—Did I understand that the warrants had not been paid?

Mr. EMERY.—No, your Honor. Counsel says they are warrants but they are not.

Mr. FALKNOR.—He has kept them but the State has asked that they be returned.

Mr. EMERY.—That is counsel's testimony and not the witness'.

Mr. FALKNOR.—I think that letter you have from the State will show.

The COURT.—Proceed. I just wanted to know if I understood the witness.

Mr. FALKNOR.—Yes. He kept them.

Q. What wages did you say you were earning at the time? A. Two dollars and six bits.

Q. I thought you said something like four dollars?

A. No.

Q. At the time you were earning $2.75 a day?

A. Yes, sir.

Q. That is the wages you had been receiving for several months previous to the time of the accident?

A. Yes, sir.

Q. That is the amount—what wages are you getting now? A. $3.00.

Q. You are getting twenty-five cents a day now more than you were receiving on the day of the accident and for several months previous? [85—53]

A. Yes, sir.

Q. What work are you doing now?

A. Setting forms.

Q. For whom? A. For Andrew Peterson.

(Testimony of Charles J. Schlief.)

Q. Doing city work?

A. No, sir, county work.

Q. How long have you been working for Mr. Peterson? A. About two months.

Q. For whom were you working previous to that time? A. Messrs. Krogh & Jessen.

Q. How long were you working for Krogh and Jessen? A. About two months.

Q. Previous to that and following the accident, for whom were you working?

A. For J. T. Hardman.

Q. You are getting $3.00 a day now?

A. Yes, sir.

Q. And you have worked for your present employer two months? A. Yes, sir.

Q. And previous to that you worked for Krogh & Jessen? A. Yes, sir.

Q. What did they pay you? A. $3.00.

Q. You worked for them a couple of months; previous to that employment, you worked for whom?

A. J. T. Hardman.

Q. What did he pay you? A. $2.50.

Mr. FALKNOR.—I offer the claim that he made to the State in [86—54] evidence and ask that it be marked Defendant's Exhibit Number 5.

Mr. EMERY.—Before it is admitted I wish to examine the witness about it. That is all.

The COURT.—Very well. I will reserve the ruling on its admission until you cross-examine.

Mr. FALKNOR.—I think that is all.

(Testimony of Charles J. Schlief.)

Redirect Examination.

(By Mr. EMERY.)

Q. Mr. Schlief, I notice that this exhibit last mentioned as Defendant's Exhibit 5, bears date the 25th of January, 1913. Did you write that paper of yourself or did you only write the signature to it?

A. I only wrote the signature to it.

Q. Did you know what the contents of it were when you signed it?

Mr. FALKNOR.—I object to that, your Honor. I think that where he signs a claim that he made to the State that he certainly ought to be bound by it.

Mr. EMERY.—Well, we will see.

The COURT.—Let him answer.

A. No, sir, I did not.

Q. Who wrote this paper? **[87—55]**

A. I couldn't tell you who wrote it.

Q. You say, "I can't tell you who wrote it"?

A. No, sir.

Q. Where were you when that was written?

A. I was in the hospital.

The COURT.—Speak louder.

A. I was in the hospital.

Q. Do you know now whether you stepped on the end of the board and made a misstep thereby stepping in front of the car or how you got on the track?

A. No, sir, I do not.

Mr. EMERY.—I have no objection to the exhibit then with this explanation.

The COURT.—It may be admitted as Defendant's Exhibit 5.

(Testimony of Charles J. Schlief.)

(Document in question received in evidence and marked as Defendant's Exhibit 5.)

Q. Now, I show you a partial voucher and letter with covers, envelopes, bearing the date March, 1913—March 24th, pinned together. Let them be marked Plaintiff's Exhibit "E," also a similar set of papers with the unsigned notice of election in it and duplicate, and a like voucher for the month ending February 23d, bearing date March 10th, which will be marked Plaintiff's Exhibit "F." I will ask you if these are the papers you meant when you say you got warrants from the State? A. Yes, sir.

Q. Did you ever sign or execute these papers or anything like it? [88—56] A. No, sir.

Q. And you did not return them? A. No, sir.

Q. Did you do that by your own account or on the advice of your counsel?

A. Most on account of the advice of the State.

Q. You have never been paid any sum whatever by the State? A. No, sir.

Mr. FALKNOR.—Don't lead your witness.

Mr. EMERY.—Well, he said he did not. He told you he did not. Now, I offer these in evidence, marked respectively Plaintiff's Exhibit "E" and "F."

Mr. FALKNOR.—No objection.

The COURT.—Admitted.

(Documents in question received in evidence and marked as Plaintiff's Exhibits "E" and "F" respectively.)

The COURT.—I might suggest as we go along

(Testimony of Charles J. Schlief.)

that A, B, and D have not been offered in evidence.

Mr. EMERY.—Well, then I will offer all the exhibits that have been identified by the plaintiff at this time.

Mr. FALKNOR.—No objection.

The COURT.—They may be admitted.

(Plaintiff's Exhibits "A," "B," and "D," for identification received in evidence and marked Plaintiff's Exhibits "A," "B," and "D" respectively.) [89—57]

Mr. FALKNOR.—If there are any which I have identified which I have not had admitted, I would like to have them admitted.

The COURT.—Yours are all admitted.

Mr. EMERY.—That is all.

Recross-examination.

(By Mr. FALKNOR.)

Q. Did you receive any letter from the Industrial Commission following the receipt of these warrants, asking that they be returned? A. Yes, sir.

Q. Is that it (handing witness letter)?

A. Yes, sir.

Q. That is it? A. One just like it.

Mr. FALKNOR.—We ask that this be received in evidence and marked Defendant's Exhibit 6.

Mr. EMERY.—I don't object to that.

The COURT.—It will be admitted. [90—58]

(Letter in question received in evidence and marked Defendant's Exhibit 6.)

Mr. EMERY.—This paper, marked Plaintiff's Exhibit "G."

(Testimony of Charles J. Schlief.)

Mr. FALKNOR.—I have no objection if you say that is a copy.

Mr. EMERY.—That is a copy.

The COURT.—It may be admitted.

(Document in question received in evidence and marked as Plaintiff's Exhibit "G.")

(Mr. Emery reads Exhibits "F" and "G" to the jury).

Q. (By Mr. FALKNOR.) Do you know who Clara May is? Do you know who she is?

A. Yes, sir.

Q. Who is she? A. She is my wife.

Q. Then your wife wrote this out; your wife wrote this out and you were not married at the time?

A. No, sir.

Q. But you have been married since? A. Since.

Q. Clara May was your intended at that time?

A. Yes, sir.

Q. And she came up to see you at the hospital?

A. Yes, sir.

Q. And you gave her the facts? A. Yes, sir.

Q. And she wrote it out? [91—59]

A. Yes, sir.

Q. You signed it?

A. I don't know as she wrote it out.

Q. Well, that is her handwriting, isn't it?

A. No, sir, that is not her handwriting.

Q. But she was there when you signed it—she witnessed your signature? A. Yes, sir.

Q. Who wrote it out? Who wrote it out?

Mr. EMERY.—He said he didn't know.

(Testimony of Charles J. Schlief.)

Mr. FALKNOR.—He is testifying.

The COURT.—Let the witness testify. Let him answer.

Q. Who wrote this out?

A. Well, if I could remember who was there I could tell you who wrote it out.

Q. But someone wrote it out at the hospital?

A. Well, Mr. Kumpf wrote it out.

Q. Mr. Kumpf wrote it out at the hospital?

A. I guess he was there; I wouldn't swear that he wrote it out at the hospital.

Q. You signed in the presence of your wife?

A. Yes, sir.

Mr. FALKNOR.—Yes. That is all.

(Mr. Falknor reads the last referred to exhibit to the jury.) **[92—60]**

Re-redirect Examination.

(By Mr. EMERY.)

Q. Before the time that you went to work for Krogh & Jessen what was your trade or occupation?

A. Carpenter work.

Q. What wages have you received at various times for services in that capacity here in this vicinity?

A. $4.00.

Q. As high as $4.00 a day? A. Yes, sir.

Q. Did you have any employment in that business at the time you went to work for them?

A. No, sir.

Mr. FALKNOR.—I object to that as immaterial and I move that this testimony be all stricken.

(Testimony of Charles J. Schlief.)

The COURT.—No, let it stand.

Mr. EMERY.—That is all.

(Witness excused.) [93—61]

[Testimony of Dr. Frank L. Horsfall, for Plaintiff.]

Doctor FRANK L. HORSFALL, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. EMERY.)

Q. State your name.

A. Frank L. Horsfall.

Mr. EMERY.—Do you admit his qualifications?

Mr. FALKNOR.—Yes.

Q. Doctor Horsfall, you are a practicing physician here in the city of Seattle, and also surgeon?

A. I am.

Q. You are also engaged in giving lectures on surgery and anatomy?

A. To the nurses at the Minor Hospital.

Q. Have you seen the plaintiff Charles J. Schlief within a few days and examined him?

A. I saw him at my office the other day.

Q. What day was it?

A. It was the end of the week; I think it was Saturday or Monday of this week; I have forgotten which.

Q. Have you examined the plate which is in evidence in this case; Plaintiff's Exhibit "B" which I now hand you? [94—62] A. I have.

Q. That plate was made by Doctor Snively at your

(Testimony of Dr. Frank L. Horsfall.)

suggestion with an X-ray machine?

A. Yes, sir, it was.

Q. I will show you a picture which will be marked Plaintiff's Exhibit "H"; is that a picture made from that same plate?

A. I believe it is. I had this in my office subsequent.

Q. Doctor, is that foot as shown by the plate in its normal state? A. I think not.

Q. What is the trouble with it?

A. Why, the arch of the foot is flattened.

Q. To what extent?

A. Why, very greatly and when the patient is under examination the arch appears to be obliterated.

Q. You examined the arch personally by manipulation, did you? A. I did.

Q. As well as by means of this plate? A. I did.

Q. What part of the bones of the foot; what particular bone of the foot is misplaced,—or bones?

A. Well, the bones that are most affected here are the scaphoid and cuneiform bones and the cuboid. Those bones are the bones that are in front of the astragalus and os calcis. To make it clear to the jury, I can show by this foot (referring to skeleton of foot).

Q. Well, explain that to the jury.

A. This is a human foot (indicating). When a man is [95—63] standing up the arch underneath, which is called the plantar arch; the bones that compose this arch are this bone (indicating) which is known as the scaphoid bone because of its

fancied relation to a boat; the one on the outside on the left is known as the cuboid because of the long surface. These three bones (indicating) are known as the three cuneiform bones. There are a number of ligaments that hold the foot together from the top, but for the purposes of this evidence, the ones that are most important are the ones that form the sole, that are known as the plantar ligaments. There are really two arches to the foot. One arch is the inner arch and the other is the outer arch. As a matter of actual condition, it is all formed by one ligament that is split up as the finger of my hand, all belonging to the hand, but there are four fingers, so this ligament it has a great root that lies here (indicating).

Q. Here? (Pointing.)

A. Attached to the os calcis. It spreads out like a fan. A number of the fibres are attached down here to this metacarpal bone and some come right down to this bone here (indicating). From where it splits on the inner side of the foot and comes out again like the fan arrangement, is attached to a small bone on the first metatarsal, and also at this point at the end of this bone (indicating). That tendon, or one of the great muscles of the leg comes down from behind and passes right over here and attaches to this bone (indicating) and helps in the formation of this arch. When a man [96—64] is at rest, the arch is much more prominent than when he is standing on his foot because the weight of the body pushes the arch downward and flattens it out a little. When

(Testimony of Dr. Frank L. Horsfall.)

this arch is flattened—what we call a flat foot result—it is because these ligaments have been separated from their attachments at the bony surface in front or behind, or because they are cut with some sharp instrument in the center. These ligaments are entirely different things than the tendons or muscles themselves, because they are poorly supplied with blood and nerves and any portion of the body which is poorly supplied either with blood or nerves does not tend to heal, and when these ligaments are torn loose from their attachments they very rarely if ever become attached again, and the result is that the man walks with a completely flat foot and he has pain, because these bones are pushed out of their normal position. If that is normal (indicating) when they are pushed down, these bones are crowded down here and backward, and these surfaces are pushed forward against the bones that lie in front of it. This scaphoid bone which lies in front of this bone which forms the ankle joint is also pushed forward—

Mr. FALKNOR.—If your Honor please, it seems to me there ought to be a limit to this somewhere. This is all very interesting—

The COURT.—I think he is just about through.

Q. The large bone at the top is called the astragalus? A. Yes, sir. [97—65]

Q. And the os calcis or—

A. Or the calcaneum—

Q. Is the bone below? A. Yes, sir.

(Testimony of Dr. Frank L. Horsfall.)

Q. I think you said the bones involved in this injury were what?

A. The three cuneiform and scaphoid bone and possibly the cuboid.

Q. Now, does the misplacement of those bones show to your mind in the plate Exhibit "B"?

A. Yes, sir, it does.

Q. At the place—

A. Yes, it shows an obliteration of the joint surface.

Q. Does it also show in the picture now offered in evidence as Exhibit "H"?

A. Not as clearly as it does in the plate.

The COURT.—Is there any objection?

Mr. FALKNOR.—No.

The COURT.—It may be admitted.

(Picture in question is received in evidence and marked as Plaintiff's Exhibit "H.")

Q. Will these ligaments, in your opinion, ever attach to the bones to which they belong?

A. I believe not.

Q. Will the foot ever be normal in your opinion?

A. I believe not.

Q. In your opinion what will be the continued effect of that condition as to causing pain when the foot is stepped on [98—66] without support?

A. As this man grows older he is much more likely to have pain than now.

Q. Then you consider the injury a permanent one?

A. I believe it is.

Mr. EMERY.—Just come up here Mr. Schlief and

(Testimony of Dr. Frank L. Horsfall.)

let the doctor explain this from your feet.

Mr. FALKNOR.—I would like to have both the shoes removed. I suppose you have no objection to Doctor Thompson coming up here?

Mr. EMERY.—No, not at all. If he can make any better lecture than Doctor Horsfall I want him to do it.

Q. Now, Doctor Horsfall will you point out to the jury the injury to the left foot;—or whatever one you find is injured?

A. Perhaps he had better turn around so the jury can see. Now, when this man stands up, this is almost completely gone (indicating). You cannot get anything more than a pencil under here (indicating). This is where the attachment of those ligaments that I spoke of takes place here (indicating) and comes upward here and this fan-like portion is attached here and here (indicating). Now, as the man puts his foot down and steps on it, those bones are driven forward and downward like that (indicating). So therefore they are pushed much closer to the ground than they otherwise would be and these joints are jammed tighter together. This joint is pushed closer against this bone and this bone is pushed further forward against this third bone (indicating) and these three bones are pushed further forward against these [99—67] three bones (indicating) that are anterior to it, and every time this man walks, as the joints are pushed further down, it causes him pain. Now, as he grows older, and the muscles, because of their age, have less elasticity and

(Testimony of Dr. Frank L. Horsfall.)
less contractual power, and therefore less power to support the weight of his body,—

Mr. FALKNOR.—I think we had that lecture a while ago—

The WITNESS.—I am not talking about the ligaments. I am talking about the muscles.

Mr. FALKNOR.—I thought you were going to point out from the foot.

A. I am doing this now in my own way and if you will let me do it my way we will get through. The jury will understand my idea and when Doctor Thompson does it it will be all right.

The COURT.—Proceed.

The WITNESS.—(Continuing.) As he grows older, the muscles will be less elastic and it will be flatter. Now when he steps on this bone—of course we cannot prove that he has pain but I take the man's word. If Mr. Falknor will take the trouble to hold this foot, he himself will find that these bones as he endeavors to manipulate them will give a feeling of resistance to his hand which the other foot does not give. There is more elasticity in this foot than there is in the injured foot. You yourselves can see that there is a difference. Not a very great difference but there is a difference in the arches of those two feet. When he stands up it is more marked than ever. If he stands up on top of that you can see it. [100—68]

Mr. FALKNOR.—Just have him stand up there.

(Mr. Schlief does as directed. Jury examines foot.)

(Testimony of Dr. Frank L. Horsfall.)

Mr. EMERY.—That is all. You may cross-examine.

Cross-examination.

(By Mr. FALKNOR.)

Q. Doctor, is the arch on the left foot a little more prominent than the other?

A. What part of the arch; do you mean the entire arch?

Q. Isn't it deeper on the left foot than on the right? A. What part of the arch do you mean?

Q. I mean the highest part of the arch.

A. Anteriorly, because the man has a bone here—

Q. Isn't it higher in there than here (showing)?

A. Yes, sir.

Q. A little more arch in this foot than in the other? A. Yes.

Q. It is a little flatter than this one?

A. That is because of the fact that the bones are pushed a little farther forward in front.

Q. A little more arch in the left than in the right one?

A. Yes, but don't try to confuse me with the jury now.

The COURT.—I don't care anything about this. Isn't there [101—69] a little more arch in the left foot than there is in this right foot?

A. At this point, yes, but not down here (indicating).

Q. Now, Doctor, did you take an X-ray of the other foot? A. Yes.

Q. Where is it?

(Testimony of Dr. Frank L. Horsfall.)

A. Mr. Emery has it, I guess.

Mr. EMERY.—Right here it is. Do you want it?

Mr. FALKNOR.—Yes, and I would like to make this request. I would like to at some convenient place have Doctor Thompson take an X-ray of both of these feet this evening. We are not going to get through to-day.

Mr. EMERY.—Very well. That will be satisfactory.

Q. Now, this is of the right foot. Don't that show exactly the same conditions as you found in the left foot? A. I think not.

Q. You think not? A. Yes.

Q. Will you please take this and point out to the jury the difference between the two?

A. I do not believe that this—

Q. Will you demonstrate to the jury the difference between the two? A. I will try to.

Q. Take the other one.

The COURT.—Has this last one been marked as an exhibit?

Mr. EMERY.—It has not been offered.

Mr. FALKNOR.—I will offer this other one as Defendant's Exhibit 7.

The COURT.—Very well. **[102—70]**

(X-ray plate in question received in evidence and marked as Defendant's Exhibit 7.)

The WITNESS.—Now then, those two are not the same. This bone (indicating) is closer to its articulation than this one is (indicating), because this one is pushed further down. This bone appears

(Testimony of Dr. Frank L. Horsfall.)

higher with relationship to this bone than the point of this bone does here (indicating). In the next place this joint and this joint (indicating) have not the deep shadow between them at this point that those two have (indicating). Here the condition is again more marked. This is jammed down quite tightly; this cuneiform bone, than this one is. A difference of the level of those two bones and it is very easily seen.

Q. You never treated him? A. No, sir.

Q. You were called in when?

A. Why, either Saturday or Monday; I have forgotten which.

Q. For the purpose of becoming qualified to become a witness?

A. Yes, sir; to testify to the condition of the plates and the man's foot.

Q. By the plaintiff?

A. By the plaintiff's attorney.

Q. People have flat feet? A. They do.

Q. Without having suffered a great accident?

A. They do.

Q. Have both feet flat? [103—71]

A. They do.

Mr. FALKNOR.—Yes, that is all.

Redirect Examination.

(By Mr. EMERY.)

Q. Do you consider it necessary for this man to wear something to support this arch?

A. He will have to wear something if he wants to be free from pain.

(Testimony of Dr. Frank L. Horsfall.)

Q. Will that condition always continue?

A. I believe so.

Mr. EMERY.—Well, that is all.

(Witness excused.) [104—72]

[Testimony of Dr. J. H. Snively, for Plaintiff.]

Doctor J. H. SNIVELY, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. EMERY.)

Q. Doctor Snively, what is your business?

A. I am a physician and surgeon.

Q. Do you make a specialty of any particular part of your profession?

A. I am specializing on X-ray work now.

Q. How long have you followed that business?

A. My profession?

Q. Yes. A. Since 1905.

Mr. EMERY.—Do you admit his qualifications?

Mr. FALKNOR.—Yes.

Q. Did you make two X-ray plates that are here bearing your mark?

A. Well, I made two plates for you.

Q. Of Mr. Schlief's foot? A. Yes, sir.

Q. One of the right foot and one of the left?

A. Yes. [105—73]

Q. Is this plate Exhibit "B" made from the left foot? A. Yes, sir, this is the left foot.

Q. Did you make a picture from that?

A. Yes, sir.

Q. Are these the pictures that you made?

(Testimony of Dr. J. H. Snively.)

A. Those are the pictures, yes, sir. I think it is marked which is the right and which is the left.

Q. Are these the correct reproductions of the X-ray?

A. Yes, sir, they are. Without any retouching or anything.

Q. They are made directly from this man's two feet by you? A. Yes, sir.

Q. From your examination of the foot and from the X-ray picture of the feet, did you discover anything the matter with either foot?

A. Yes, I did.

Q. What was the trouble?

A. Well, the left foot has been subjected to an injury and the results of that injury are seen in the plate. The lower end of the fibula was broken; it has healed. Then the arch of the foot suffered an injury; probably a wrenching or crushing injury of the foot.

Q. What point on the fibula do you say was broken?

A. Well, as I remember about an inch—it is rather a longitudinal fracture extending from about two inches on the posterior surface downward and forward.

Q. As shown by the shadow on the picture?

A. Yes, sir.

Q. That has healed naturally? [106—74]

A. Apparently it has healed up perfectly sound and solid.

(Testimony of Dr. J. H. Snively.)

Q. Did you find that the external malleolus has been injured?

A. Yes, sir, it has been injured; the lower end of the fibula.

Q. And the man you found to be suffering with what is called in your terms, a flat foot?

A. Yes, sir.

Q. Did that condition prevail as to the right foot?

A. No, it did not seem apparent; it seems to be also more particularly a sub-acute inflammatory condition, involving the bones of the arch of the left foot. There seems to be a peri-articular swelling and a little cloudiness in the joint surfaces of those bones.

Q. In your opinion will the ligaments ever again attach themselves to those bones in a normal state?

A. They will, I think, in a way but not like they were before.

Q. What do you think about the injury with regard to its being permanent?

A. He will probably always be troubled more or less with that foot.

Cross-examination.

(By Mr. FALKNOR.)

Q. When did you first see Mr. Schlief? [107—75]

A. The day that I took these pictures. I do not remember when it was.

Q. About when was it?

A. Day before yesterday.

Q. That is the first time you ever saw him?

A. Yes, sir.

(Testimony of Dr. J. H. Snively.)

Q. He did not come to you for treatment?

A. No, sir.

Q. He just came to you to have the X-rays taken of his foot? A. Yes, sir.

Q. And you understood you would appear and testify in regard to his foot?

A. There was nothing said about that.

Q. But you understood that you would be a witness?

A. No, sir. I did not know what he was brought there for. He was brought in there by Doctor Horsfall. I thought he was a private patient of Doctor Horsfall's.

Q. You knew he had some litigation?

A. Judge Emery was in to-day and said that he would probably call me as a witness this afternoon.

Q. Of course many people have flat feet?

A. Yes, surely.

Q. Do you think anyone looking at his feet as he stands up would recognize any difference in the flatness in them? A. Why, I think so.

Q. You think so?

A. That is, anyone who is accustomed to seeing those things.

Q. Both feet are flat, are they not? **[108—76]**

A. Why, I think both feet are a little flatter than the average foot would be; some arches differ a little. It might be natural for his arches to be; the right one is.

Q. It might be natural for the left one to be the way the left one is? A. Yes, sir.

(Testimony of Dr. J. H. Snively.)

Q. And it might be natural for the right one to be the way the right one is? A. Yes, sir.

Q. But you would not think that the left one was natural in the way it is? A. No, sir.

Q. Why do you draw that distinction?

A. Because the left one is injured; shows an injury which I don't think was there before the injury.

Q. The injury was to the small bone of the leg?

Mr. EMERY.—I object to that statement.

A. I think I testified to the small bone of the leg being injured.

Q. That is above the ankle?

A. Above the ankle; I also testified that the cuneiform bones had also suffered an injury.

Q. No line of fracture; no indication that any of them were fractured?

A. No, but I said they had suffered a tearing injury.

Q. The X-ray would not show that?

A. Well, the X-ray does show it.

Q. The X-ray simply shows the position of the bones?

A. I don't know what it would show. I know what it does show. [109—77]

Q. Isn't it possible to take these X-rays and measure to show which one of the arches is higher or lower? A. Yes, of course you can do that.

Q. Of course you can do that. Did you do that?

A. Yes, sir.

Q. Didn't you find there was absolutely no difference from the measurements on the X-ray plate as

(Testimony of Dr. J. H. Snively.)

to which was higher and which was lower?

A. You did not say—

Q. Just answer the question; didn't you find the arches were the same?

A. On the X-ray picture?

Q. Yes. A. No, not exactly the same.

Q. How much difference?

A. There isn't much difference shown on the plates, as to the flat foot.

Q. How much difference did you find?

A. I don't just remember now.

Q. You didn't find any appreciable difference?

A. Well, yes, there was a slight difference.

Q. But it was so slight—

A. These plates were taken with the man lying down. He did not have his weight on the feet.

Q. They both had the same weight on?

A. They did not have any weight on.

Q. Neither have any weight on; the bones were in repose?

A. The bones were in repose; both in the same position as nearly as possible.

Q. After you got the X-ray plates and measured them you **[110—78]** found that the arch is as high in one as the other if you took the plates and measured them?

A. It does not show a very great difference in the plate alone.

Q. If the arch was crushed the one that was crushed would necessarily and naturally be lower?

A. Not necessarily.

(Testimony of Dr. J. H. Snively.)

Q. Ordinarily, wouldn't it be?

A. No, I don't think so.

Q. It wouldn't be higher, wouldn't it?

A. I have taken a good many pictures of flat feet with people lying down that the foot will spread all over the floor with the weight on it.

Q. You did not take them standing?

A. No, sir.

Q. You don't know what the result would be standing on the floor?

A. I did not take them standing that way. They did not ask for them.

Q. You took them in repose; both of them?

A. Yes, sir.

Q. In repose, both of them—the arch in one is to all intents the same as the other by the measurements on the plate?

A. By the measurements on the plate, it is just a trifle lower than the other.

Q. Of course you could not tell whether he had any pain or not? A. No, of course not.

Q. You did not examine his pulse rate? [111—79]

A. I did not see the man until yesterday. I did not examine his pulse.

Mr. FALKNOR.—No. That is all.

Redirect Examination.

(By Mr. EMERY.)

Q. Could you detect by manipulation of the foot that there was a difference in the two arches?

A. Yes, there is a difference in the two arches.

(Testimony of Dr. J. H. Snively.)

Q. Are the bones in the left foot perfectly tight?

A. Yes, it is tight—*o* as I said, a slight periarticular inflammation—sort of a sub-acute inflammation of the bones forming the arch of the foot. There is some thickening of the articular tissues and it shows that these ligaments have been subjected to an injury. In addition to that, this sub-acute inflammation in the region of these bones has produced a slight haziness or cloudiness of the joints and a slight rarefication of the bone. Those things are plainly seen on the plate by any person in the habit of judging.

Q. These things plainly appear upon the plate to an expert eye? A. Yes, sir. **[112—80]**

Recross-examination.

(By Mr. FALKNOR.)

Q. A little change in the angle makes a big difference, doesn't it?

A. No, there is no change in these plates.

Q. I say a little change in the angle makes a big difference, doesn't it?

A. Not necessarily so. There are some parts of the body that a change in the angle will show a difference. There are other parts that will not show a difference.

Q. An X-ray is a shadow?

A. An X-ray is a shadow picture, yes.

Q. And a slight change in the position of the body that throws the shadow, of necessity, affects the shadow, doesn't it?

A. Not necessarily so. There are some bones—

(Testimony of Dr. J. H. Snively.)

some portions of the body that that will not do. You can move your tube six or eight inches and it will not make any appreciable difference.

Mr. FALKNOR.—That is all.

(Witness excused.) [113—81]

[Testimony of Dr. Everett O. Jones, for Plaintiff.]

Doctor EVERETT O. JONES, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. EMERY.)

Q. State your name. A. Everett O. Jones.

Mr. EMERY.—Do you admit the doctor's qualifications?

Mr. FALKNOR.—I presume he is qualified. There are so many doctors I can't remember them all. I will admit he is qualified.

Q. Where do you live? A. Seattle.

Q. How long have you lived here?

A. Six years.

Q. Where is your office?

A. The Cobb Building.

Q. What school are you a graduate of?

A. University of Pennsylvania.

Q. How long have you practiced your profession?

A. Twenty years.

Q. Medicine and surgery?

A. Yes, sir. [114—82]

Q. Are you in general practice here at this time?

A. Well, my practice is devoted to surgery. I am not doing medical practice.

(Testimony of Dr. Everett O. Jones.)

Q. You are devoting your practice to surgery; how long have you followed surgery particularly?

A. Six years.

Q. Have you seen and examined the plaintiff, Mr. Schlief, in this case? A. I have.

Q. As to the effect of the injury upon his foot?

A. I have.

Q. When did you make the examination?

A. About three days ago.

Q. From your experience in your profession are you able to tell whether from your examination the left foot of Mr. Schlief has been subjected to an injury or not?

A. There was a flat foot on the left side.

Q. What do you mean by a flat foot?

A. Flattening of the arch; broken arch in other words.

Q. Did you find that condition prevailing in the right foot at all?

A. No, no, I could not say there was a broken arch on the right foot.

Q. What was it; a normal arch on the right foot?

A. Yes, sir.

Q. But the left one was different?

A. Yes, sir, there is a distinct difference.

Q. How did you make the examination; how carefully?

A. Why, I made the customary physical examination.

Q. With your hands? [115—83]

A. With my hands.

(Testimony of Dr. Everett O. Jones.)

Q. Manipulating the bones and felt them closely?

A. Yes, sir.

Q. Was that examination sufficient to enable you to testify that the man had a flat arch or a broken arch in his left foot? A. Yes, sir.

Q. What is the condition of the tendons in such a case and what is the condition of that case—the tendons and ligaments, I mean?

A. The ligaments on the under surface of the foot —that is the under surface of the foot have been—are now in the condition of being elongated; that is stretched out and lengthened, so that when the weight of the body comes on the arch of the foot, it allows it to flatten; straighten out.

Q. Not in a normal condition?

A. Not in a normal condition.

Q. Will they ever regain their normal condition in your opinion? A. In my opinion, not.

Q. In the condition in which you found them what will be the natural effect when the man walks on his foot as to sensibility?

A. The effect of flat foot is to cause pain.

Q. Can that be relieved by any natural means or must you resort to artificial means entirely?

A. It can be relieved to quite considerable an extent by wearing a plate which will hold the arch up and in a measure take the place of— **[116—84]**

Q. Put in the bottom of the shoe?

A. Put in the bottom of the shoe, or a steel spring; something to prevent the arch from dropping when the weight comes on the foot.

(Testimony of Dr. Everett O. Jones.)

Q. Doctor Jones, is that difference in the elevation of the bones; does that necessarily have to be very great to produce flat foot?

A. No, it is usually the case that the smaller grades of flat feet—that is when the amount of dropping is small the pain is more; that is a different proportion to the amount of pain that is seen when the arch is entirely down.

Q. Can you explain why that is?

A. Well, it is due to the pull on the ligaments. When the arch is down, absolutely flat, so that it stays down, why the ligaments are stretched out so far that there is not additional pull on them when the weight is borne.

Q. In this case is the arch entirely down or only partially down?

A. No, it isn't entirely down. It is principally noticeable when the man bears his weight on the foot.

Q. Which of the bones there are in your opinion involved in the injury?

A. It is the so-called inner arch. It is this arch here that includes the cuneiform and scaphoid and this part of the os calcis; from this point to that point (indicating).

Q. That is from the upper extremity of the right to the left tarsal?

A. As the foot is at rest the arch stands in about that [117—85] angle (indicating); as weight is borne on it it tends to drop this way and that brings these articulating surfaces of the bones here close

together on the top and a little apart from the bottom; and that is the mechanism for the production of pain.

Q. That is not a natural or normal condition?

A. No.

Q. Will that condition remain permanent, in your opinion?

A. In my opinion it will. There is no tendency in that condition to spontaneously repair itself in any way. When the ligaments are once elongated and stretched out and torn they tend to stay that same length.

Q. And the man will always be that way?

A. Yes, sir.

Q. Did you examine the X-ray pictures taken from the foot?

A. No, sir, I haven't seen them.

Q. Now, these are marked left and right.

Mr. FALKNOR.—I would have preferred if he had not indicated which was the left and which was the right.

Mr. EMERY.—They are marked right on the side in plain English. Probably he couldn't tell if they were not.

Q. Did you notice anything shown by the picture of the foot there indicating any injury to the arch?

A. Why, the only thing I see is a little roughening of the joint surfaces between the tarsal bones and a little thickening—other than that I do not see anything; a little irregularity in the outline of the joint surfaces.

(Testimony of Dr. Everett O. Jones.)

Mr. EMERY.—That is all. [118—86]

Cross-examination.

(By Mr. FALKNOR.)

Q. Both look about the same height, don't they?

A. There is very little difference.

Q. Now, when you speak of a flat foot, it is a foot where the arch is crushed down; or the arch is somewhat obliterated by the foot being flattened?

A. That is the terminal stage of the flat foot, when the arch is entirely broken.

Q. And when the arch is broken those bones are practically on the surface; there is very little arch underneath, isn't there?

A. I don't know that I get your point.

Q. Well, when we have a flat foot, it is when those bones are down on a level with the balance of the foot? A. You mean the arch is obliterated?

Q. Yes.

A. Yes, that is the terminal; that is the last stage.

Q. Now, these pictures as far as you can detect from your eye, the arch is the same in both of them?

A. Very nearly.

Q. So if one is flat the other is flat, isn't it?

A. That doesn't necessarily follow.

Q. It would follow from the indication of the X-rays, wouldn't it?

A. Well, the X-ray does not signify much as to the condition [119—87] of the arch except when the arch has been entirely obliterated and broken down.

(Testimony of Dr. Everett O. Jones.)

Q. It shows how high these bones are above the balance of the bones, don't it; the X-ray?

A. In that particular plate, yes, but from the standpoint—

Q. It shows how much arch there is in each foot?

A. No, that is a different question.

Q. Can't you tell how much arch there is in that foot?

A. No, sir, it takes more than an X-ray picture to make a clinical diagnosis.

Q. Well, taking the X-rays, everything else being equal, you would say there was?

A. No, taking the X-rays alone, I would not venture an opinion at all.

Q. You cannot tell anything from the X-rays?

A. No, sir.

Q. The X-rays do not indicate anything?

A. They indicate something, yes, but their indication has to be taken in conjunction with other findings and not by themselves.

Q. Did you ever treat this man?

A. No, sir.

Q. When did you see him?

A. About three days ago, I testified.

Q. He came to you for the purpose—

A. Of an examination.

Q. For the purpose of an examination so you could appear and testify?

A. They came for my opinion as to the condition of his foot. [120—88]

Q. And you understood you were to appear and

(Testimony of Dr. Everett O. Jones.)

testify as a witness for him?

A. I told him I would do so if I was asked.

Q. But you never treated him? A. No, sir.

Q. Never had occasion to examine him?

A. No, sir.

Mr. FALKNOR.—That is all.

Q. (By Mr. EMERY.) Your testimony has not been changed by the fact that you were told that you would be asked to give it, has it? A. No, sir.

Mr. EMERY.—That is all.

(Witness excused.) [121—89]

[Testimony of John Kroon, for Plaintiff.]

JOHN KROON, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. EMERY.)

Q. Mr. Kroon, where do you live?

A. 34th Avenue South.

Q. What is your business?

A. I am a bricklayer.

Q. Were you engaged in your bricklaying in January last at the time Mr. Schlief was hurt?

A. Yes.

Q. Where were you at that time? A. What?

Q. Whereabouts were you; down in the hole?

A. I was down in the hole.

Q. Laying that brick in that gateway?

A. Yes, sir.

Q. How long had you been to work there that morning before he was hurt?

(Testimony of John Kroon.)

A. Well, I don't know—maybe—well, I don't know how long, maybe one hour or so.

Q. Now, how high had you got the wall laid up at the time **[122—90]** the accident happened?

A. Oh, I only put in a few bricks; two or three course or something.

Q. Mr. Schlief was bringing the brick and mortar to you? A. He handed the brick to me, yes.

Q. He had to hand them down to you and you laid them? A. Yes.

Q. Did he have to pass around and in different places around the hole or did he stand in one place?

A. He stand in the place right before me, handing the brick.

Q. When you turn around, following around the course, he had to walk around the hole, didn't he?

A. No, he stand in the same place.

Q. Will you please come down here. Now, how large was that hole? A. This is about six feet.

Q. About six feet in diameter?

A. Yes. The brick was four feet inside.

Q. The brick was four feet inside? A. Yes, sir.

Q. The hole was near the track? A. Yes, sir.

Q. He had to stand on the outside of the hole?

A. Yes, I stand in the hole.

Q. Down in the bottom?

A. Down in the bottom.

Q. And you had to bend over and lay the brick?

A. Yes.

Q. Where was he accustomed to stand to pass the brick to **[123—91]** you?

(Testimony of John Kroon.)

A. He stand right on the edge of the hole.

Q. Which side; which way?

A. The north side of the hole.

Q. The north side of the hole, here (indicating)?

Mr. FALKNOR.—Let him mark it.

Q. Which way would you say he was?

A. I don't know; is this north?

Q. That is north?

A. On that side (pointing).

Q. Did he ever stand here between the hole and the track?

A. No, he stand right on this side (indicating).

Q. Now the hole itself, how near did that come to the rail; the edge of the hole; the edge of the excavation?

A. It comes, I don't know; maybe three feet; I don't know. It came under the ties.

Q. It came under the ties, the edge of the hole?

A. The edge of the brick comes under the ties.

Q. The ties stick out from the rail over the hole?

A. Yes. They dug the hole underneath the ties.

Q. They dug the hole underneath the ties?

A. Right under the ties.

Q. Do you know about any plank being across the street there?

A. There was a plank laid across there from the sidewalk across.

Q. From the sidewalk across? A. Yes, sir.

Q. How close were those planking to the hole?

A. They was right in this end over the hole. Maybe a few inches over (indicating).

(Testimony of John Kroon.)

Q. Were these plank laid crosswise of the street or lengthwise? [124—92] A. No, crosswise.

Q. Crosswise of the street; that is this way?

A. No, crosswise (indicating). This way (indicating).

Q. Came right close to the hole?

A. Yes, sir.

Q. How long were those plank?

A. Oh, I don't know.

Q. They laid right down flat on the surface?

A. Yes, sir.

Q. Was the asphalt put on there then?

A. No, there was nothing put on.

Q. No concrete there? A. No, not there.

Q. Never had been put on?

A. It isn't in yet.

Q. In fact, this was being newly paved here?

A. Yes, there was concrete up along the railroad.

Q. Concrete up along the railroad in here (indicating)? A. Yes, sir.

Q. But not in here at all (indicating)?

A. No, sir.

Q. Was there a pile of dirt anywhere there; where was the dirt piled?

A. There was dirt piled on that side (indicating).

Q. Any piled here (pointing)? A. No, sir.

Q. That had been thrown out of the hole?

A. No, sir, right over here (indicating).

Q. Where were the ties put that you had over the hole at [125—93] night; where did you throw them; you covered the hole at night, didn't you?

(Testimony of John Kroon.)

A. No, we dug the hole and we covered the hole with ties at night-time and we took them out and throwed them out on the parking strip.

Q. On the dirt pile?

A. No, on the parking strip.

Q. Did you see the car at the time it struck Mr. Schlief?

A. Yes, at the time it struck him I saw it.

Q. Where was he at the time it struck him; Mr. Schlief?

A. He stepped right up on the railroad track.

Q. Stepped right upon the railroad track?

A. Yes, sir.

Q. That was on which side of the railroad track?

A. The east side of the railroad track.

Q. Did he see the car; could you tell whether he saw the car or not?

A. I don't know as he saw it. I don't know.

Q. How high was your head up there from the bottom of the hole?

A. Oh, the hole is about two feet deep; maybe a few inches more.

Q. Then your head was above the level of the street? A. Yes, sir.

Q. Did you see the car before it struck him?

A. No.

Q. Did you hear any bell rung?

A. Yes, at the same time he stepped on the railroad track; on the car track, I heard the bell ring and I turned my head to the left and saw the rear end of the car coming **[126—94]** here because I was

(Testimony of John Kroon.)

three or four feet distance ahead of the car.

Q. You say at the time the bell struck he was three or four feet ahead of the car?

A. No. When I heard the bell ring I turned my head to the left and saw the car and it was just the same time he stepped on the railroad track and then I saw the car right there (indicating).

Q. How far would you say the car was from the hole when you heard the bell ring?

A. I don't can tell that.

Q. Did you hear it ringing as it approached some distance back?

A. Yes, I heard it ring and I turned my head and I see the car right there beside me.

Q. Was it right there at the hole?

A. Yes, right beside me.

Q. Did you hear it ring before it got to the hole?

A. No.

Q. How many times did you hear it ring?

A. One time.

Q. Could you distinguish any space of time between the stroke of the bell and the time that the car struck Mr. Schlief?

A. Oh, it's hard to tell. It is pretty near just the same. It is hard to tell.

Q. How far did it carry him?

A. Oh, the car struck him and maybe it throw him ahead on the track 25 feet or something. I couldn't tell.

Q. What part of the car struck him first?

A. Well, he stepped on this left foot—the right

(Testimony of John Kroon.)

foot on **[127—95]** the railroad track, and he turned around and the car struck him maybe on the shoulder or something on that side. I couldn't see because he turned around.

Q. Did you see where the fender hit him?

A. Yes, the fender hit him and took him off of the track, and the next time the car touched him?

Q. Then the car struck him twice?

A. Yes, sir. He stand on the track.

Q. The next time the fender struck him on the ankle?

A. Yes, sir, the next time he took him and swept him off of the track.

Q. Did you help pick him up?

A. No. Mike Hanson and the Inspector they pick him right away and carried him into the store house. I don't know.

Mr. EMERY.—That is all.

Cross-examination.

(By Mr. FALKNOR.)

Q. Now, if I understand you Mr. Kroon you were in the hole? A. What? **[128—96]**

Q. You were in the hole?

A. Yes.

Q. He was standing to the north of the hole?

A. Yes, on the north side.

Q. About there (pointing)?

A. Yes, about there.

Q. Well, I will mark an o, a capital O there. That is about where he was standing?

(Testimony of John Kroon.)

A. Yes, he was there standing right there beside the hole.

Q. He was handing brick to you down in the hole?

A. Yes, sir.

Q. About how far was he from the track when he was standing there?

A. Oh, about three feet or something like that. He stand about in the center.

Q. He was standing about three feet from the track so if he remained standing there the car would have gone by and not hit him? A. I guess so.

Q. If he had not stepped on the track the car would not have hit him? A. No.

Q. You heard the bell of the car ring?

A. Yes.

Q. And you saw him step on the track?

A. He stepped on the track before I heard the bell.

Q. Now, did you see what caused him to step on the track? A. What?

Q. What did he do that caused him to fall over on the track; what did Schlief do that caused him to fall over [129—97] on the track?

A. He stepped over on the track.

Q. What caused him?

A. He stepped on the end of the plank and the plank jumped—he jumped right up on the track, so he don't fall in the hole.

Q. Now at that time, just the moment he got on the track, how near was the car to him?

A. I did not see. Right when he stepped on the

(Testimony of John Kroon.)

track the bell ring and I turned my head to the left.

Q. The car was there about the same time he stepped on the track? A. Pretty near.

Q. Four or five or six feet from there?

A. I don't know; I don't see the car but I heard the bell ring.

Q. It was just a few feet?

A. Yes, I didn't see the car until it was opposite me and I heard the bell ring.

Q. When he stepped on the teetering board and jumped on the track you heard the bell?

A. Yes.

Q. And you looked and the car was right there?

A. Yes.

Q. Well then, within three or four feet of him?

A. Yes, at the time when I saw the car he was not more than three or four feet ahead of the car.

Q. If he had not taken that step or jumped the car would not have hit him? A. No. **[130—98]**

Q. And the car went about how far?

A. Well, I don't know. The car passed the crossing. It was the rear end before it stopped. Probably it run over 60 feet or something like that.

Q. Did you holler at him? A. No.

Mr. FALKNOR.—That is all.

(Witness excused.) **[131—99]**

[Testimony of ——— Kumpf, for Plaintiff.]

——— KUMPF, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

(Testimony of ——— Kumpf.)

Direct Examination.

(By Mr. EMERY.)

Q. What were you doing at the time this accident happened? A. Inspector for the city.

Q. Working for the city? A. Yes, sir.

Q. Inspector? A. Yes, sir.

Q. You were there at that place in pursuance of your duties as an inspector? A. Yes, sir.

Q. Where were you standing at the time Mr. Schlief was hit?

A. About four feet away from the work.

Q. Somewheres near that corner?

A. Well, I couldn't say, I can't see that far very well.

Q. Well, indicate it.

A. Well, I was standing about here (indicating).

Q. Make a mark there.

(Witness marks.)

Mr. FALKNOR.—The witness marks X over a little circle on [132—100] this exhibit.

Q. How big was that hole?

A. The excavation?

Q. Yes. A. About six feet.

Q. How near was you to the edge of the hole?

A. Well, I said I was about four feet from the work.

Q. Where was Mr. Schlief with reference to where you were? A. Well, he was about three feet.

Q. Between you and the track? A. Yes, sir.

Q. What was he doing?

A. Why, he was in pursuance of his work there.

(Testimony of ——— Kumpf.)

Q. Passing brick down to the mason?

A. Yes.

Q. Did you see him at the time he was struck?

A. I did.

Q. Did you see the car coming?

A. I saw it when it was close to him there.

Q. Did you hear any bell rung? A. No, sir.

Q. Had you heard any bell rung up to that time from that car? A. No, sir.

Q. As the car approached the place where they were working, did it ring any bell?

A. I didn't hear any.

Q. If it had rung one, you would have heard it?

A. I probably would.

Q. Was there any unusual noise going on around there to [133—101] prevent you hearing it?

A. No, sir.

Q. It was a good paved street?

Mr. FALKNOR.—I object to your leading the witness. Let the witness testify.

The COURT.—Let the witness testify.

Q. What was the character of the street on which the car was coming as to whether it was paved or not? A. On which side?

Q. To the south as it approached the hole?

A. Well, the extent of the work was to the east and west. The west side of the street was paved and the east side was not.

Q. Then the street ran north and south, didn't it?

A. The street—14th Avenue, yes.

Q. And the car was coming from the south on

(Testimony of ——— Kumpf.)
14th Avenue? A. Yes, sir.

Q. Now, in the direction as the car was coming, as it came along, did it come over a paved street or not?

A. The outbound track was not paved.

Q. The outbound track was not paved, but the incoming track was paved, was it? A. Yes, sir.

Q. Do you know about the size of that car?

A. About the size of it?

Q. Yes.

A. It was the standard car. I don't know what the size of it was.

Q. Was it a Ravenna Park car or a Cowan Park car? A. I don't remember.

Mr. EMERY.—Have you got the size? [134—102]

Mr. FALKNOR.—It was one of the 604 Cowan Park cars; I think they are all the same in size.

The WITNESS.—Well, it was a single ender.

Q. It was a single ender; that is, the motor was in one end? A. Yes, sir.

Q. And the entrance was in the other end?

A. It was a car that necessitated going on a Y to permit it coming back on the inbound track.

Q. The Y was how far north from where the accident happened?

A. The nearest Y was at Cowan Park.

Q. How far north was that? A. Two blocks.

Q. Were you watching Mr. Schlief while he was at work there at that time?

A. Why, I didn't have any special notice of him;

(Testimony of ——— Kumpf.)

I saw him; I was looking after the work.

Q. Did you see him step upon the track?

A. I did not.

Q. Where was he when you first saw him in connection with the accident?

A. He was on the track.

Q. How far away was the car from him?

A. Between five and ten feet.

Q. Did you hear any bell at that time?

A. I did not.

Q. Did he know that the car was there?

A. I couldn't say that he did.

Q. From his actions? **[135—103]**

A. I didn't notice anything to that effect.

Q. How far was he from the hole?

A. How far was he from the hole?

Q. Yes.

A. The extremity of the hole?

Q. Yes, the nearest point of the hole.

A. Why, he was about three feet.

Q. Was that in the place where he ordinarily went —passed—in the course of his work?

A. Why, I don't know; I didn't take any special notice as to where his course was in going to the work.

Q. Well, he had some brick here, didn't he, up here where he was getting his brick (indicating)?

A. He had brick on the east side of the track.

Q. And he passed from the hole around here across the pavement to the track?

A. Why, I didn't notice that he did.

(Testimony of ——— Kumpf.)

Q. You didn't notice which way that he went?

A. No, sir.

Q. Did you notice that he fell on any projecting plank there? A. I did not.

Q. Did you shout to him?

A. I did, but he paid no attention to it.

Q. Did he pay any attention to your shout?

A. Why, I don't know that he did, because the car hit him just about the time that I shouted.

Q. Then you must have shouted the instant that you saw the danger?

A. I think close to that time.

Q. Is this place up the track toward the south from which **[136—104]** the car came a clear space?

A. No, sir, the street comes over on a vertical curve.

Q. On a vertical curve?

A. On a vertical curve.

Q. What do you mean by that?

A. It is one that bows over.

Q. I understand, but how far back this way could the motorman, standing upright in the front window of the car, see parties working there?

A. How far could he see that?

Q. Yes.

A. Well, I guess about 600 feet away.

Q. 600 feet at least? A. Yes, sir.

Q. Except for the vertical curve the track was straight?

(Testimony of ——— Kumpf.)

A. The track was straight but it was not on a straight grade.

Q. Excepting, I say, for the vertical curve, the track was straight, with that exception?

A. Yes, sir.

Q. Was it coming downgrade somewhat?

A. Yes, sir.

Q. A slight grade or a very heavy grade?

A. About three present.

Q. This picture is a very fair representation of the street except that the street where the man stands was unpaved at that point, was it not? A. Yes, sir.

Q. Looking past the man's head, do you see a car there (indicating)? [137—105] A. I do.

Q. Now, a motorman coming on that car could see for at least 600 feet any person on the track, could he not? A. Yes, sir.

Q. The hole in which the manhole that the brick work was being constructed—how near was that dug to the rail of the track?

A. Well, properly it was dug about within a foot or two of the extreme east track. The vibration of the cars had caused the dirt to fall and the excavation was underneath the ties.

Q. And the plaintiff stood between the hole and the rails?

Mr. FALKNOR.—Now I object to that as leading.

Q. Could a man stand between the rail and the side of the hole?

A. Well, if you say what portion of the rail.

Q. At the point nearest the rail?

(Testimony of ——— Kumpf.)

A. No, he could not.

Q. Why not?

A. Because that was a portion of the excavation; a portion of the hole.

Q. How fast was the car going when you saw it?

A. I should judge between 15 and 20 miles an hour.

Q. Did the car stop perceptibly before it struck him? A. Before it struck him?

Q. Yes. A. Not that I noticed.

Q. Did you see what the motorman did?

A. No, sir, I did not.

Q. You watched the body, did you or did you not? [138—106] A. I watched Mr. Schlief.

Q. Now, just describe what happened to him?

A. Why, as the car hit him the fender of the car hit him first and he bounded back and his head hit the body of the car. He seemed to bound away from the car and the car struck him a second time and as the car started to slow up he fell off; the car proceeded about three feet further.

Q. He fell on which side of the car?

A. On the right side going out.

Q. On the east side? A. On the east side.

Q. About how far did the fender go after it struck him before it stopped; in other words, how far did it pass? A. About three or four feet.

Q. That is, after it first struck him; then after he was on the fender, how far did the car go before it stopped? A. 15 or 20 feet.

Q. You helped pick him up? A. I did.

(Testimony of ——— Kumpf.)

Q. Was he unconscious at that time?

A. Yes, sir.

Q. You did not know the extent of his injuries?

A. I did not.

Q. Did you see him afterwards at the hospital?

A. I did.

Q. When?

A. I don't know the exact length of time; about two weeks after he was hurt.

Q. Had he recovered his consciousness then? [139—107] A. He had.

Mr. EMERY.—That is all.

Cross-examination.

(By Mr. FALKNOR.)

Q. The car then came to a stop in about 15 or 20 feet after it hit him? A. It did.

Q. You did not hear any bell at all?

A. I did not.

Q. Even at the time of the impact?

A. I did not.

Q. Then you do not remember of hearing any bell?

A. I say I didn't hear any.

Q. Now, you gave us a statement at the time; the same day of the accident didn't you; you gave the Company a written signed statement?

A. Yes, sir.

Q. And in answer to the question "Was a bell or gong ringing at the time" you answered "I don't know," didn't you? A. I think I did.

Q. And you don't know now, do you, whether the bell was ringing or not? [140—108]

(Testimony of ——— Kumpf.)

A. I say I didn't hear any bell.

Q. But in answer to the question we asked you, you stated at that time, on the same day, that you didn't know whether the bell was ringing or not; your recollection then was as good as it is now?

A. I do not draw any close distinction between saying that I did and I thought I did not.

Q. Anyway, on the same day you answered that you did not know?

Mr. EMERY.—That is the third time he has admitted that.

Q. When he asked you on the same day you answered that you didn't know?

Mr. EMERY.—I object to this as an unnecessary repetition.

Mr. FALKNOR.—I want a definite answer.

Q. That is correct, isn't it? A. Yes, sir.

Q. Now, did you prepare the claim that he signed that was sent to the State? A. I did not.

Q. That is not in your handwriting?

A. No, sir, I didn't write it.

Q. Were you present when it was written?

A. I was not.

Q. You also in this statement that you gave us on the same day, stated that he stepped onto the track when the car was about ten feet from him, did you not? A. Yes, sir.

Q. That is correct?

A. Well, if I was to give it more serious thought, I would say it was not. **[141—109]**

Q. Well, you did give us a statement to that ef-

(Testimony of ——— Kumpf.)

fect on the same day. A. I did, yes, sir.

Q. That he stepped on the track—"I don't know whether he was trying to step east or slipped on a plank": You didn't know at that time what caused him to do it, whether he slipped or was trying to step east, but he stepped on the car track when the car was about ten feet away?

A. I saw him on the track.

Q. You did give the statement as I have indicated on that day?

A. I did give a statement, yes, sir.

Q. You did see the car then when it was ten feet from him? A. Between five and ten feet.

Q. At that time he stepped on the track?

A. I saw him on the track.

Q. You saw him step on the track?

A. No, sir, I did not.

Q. You gave us a statement to that effect?

A. If I gave a statement at that time it might have been as I thought—

Q. But what I am trying to get at, your recollection would, of necessity, be better than it is a year after? A. Not necessarily.

Q. Well, ordinarily?

A. Well, not in this case.

Q. You think in a year from now your recollection would be better than the written statement given the company that day? [142—110]

A. The condition of a man's mind at that time when it was taken up with the thought of the accident—the thought of the man's condition.

(Testimony of ——— Kumpf.)

Q. You were not excited, were you?

A. Well, I was thinking pretty seriously about the man's condition; more so than I was about outlining the facts.

Q. There were loose planks there?

A. Yes, sir, there were.

Mr. FALKNOR.—Yes. That is all.

Redirect Examination.

(By Mr. EMERY.)

Q. Had you noticed the tendency of the cars to pass that point at a higher rate of speed just shortly prior to this time?

Mr. FALKNOR.—Just a moment. I object to this as irrelevant, incompetent and immaterial.

The COURT.—The objection must be sustained.

Mr. EMERY.—I wish to show by this witness that complaint had been made that the motormen were running the cars by there at a high rate of speed and that it was necessary to put out flags to prevent them from doing that.

The COURT.—Yes, they might have done that, but this car might not have been running that way. They cannot be [143—111] held to the speed of that car, because of the speed of others because they might have reformed.

(Argument.)

The COURT.—He may testify as to the speed at which this car moved, but not others.

Q. I will ask you if complaint had been made by you to this Company with regard to the speed at which cars were run at this place?

(Testimony of ——— Kumpf.)

Mr. FALKNOR.—Object to that as irrelevant, incompetent and immaterial.

The COURT.—Objection sustained.

Mr. EMERY.—Note our exception.

The COURT.—Exception noted.

Q. Did you see the motorman who was running on the car at that time on that day; I mean did you see him after the accident? A. I did.

Q. Did you talk with him? A. No, sir.

Q. Was that the same motorman you had referred to as talking to before? A. I don't know.

Mr. EMERY.—Do I clearly understand that I am precluded from showing that complaint had been made to this Company about running these cars too fast by this point, and that this witness had given them notice that their cars were running at a dangerous rate of speed.

Mr. FALKNOR.—They haven't pleaded anything of that kind.

(Argument.)

The COURT.—This witness testified to the rate of speed at [144—112] which the car was moving, but I think it would be error—I am satisfied it would be error to allow the other.

Mr. EMERY.—I don't want to have any error in the record. If you are satisfied. I thought I was right about it. I guess that is all with this witness.

Mr. FALKNOR.—Well, that is all.

(Witness excused.) [145—113]

[Testimony of Mike Hanson, for Plaintiff.]

MIKE HANSON, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. EMERY.)

Q. What is your name? A. Mike Hanson.

Q. Mr. Hanson, did you see this accident at the time it happened? A. No.

Q. When did you first see Mr. Schlief at that time?

A. This time the car was stopped, Mr. Schlief was laying right beside the car; right beside the front wheel.

Q. Did you take notice of where the front end of the car was when Mr Schlief fell off?

A. Between 60 and 80 feet away from the hole.

Q. Between 60 and 80 feet away from the hole?

A. Yes, sir.

Q. That is which direction; to the north of the hole; suppose this is to the north? A. Yes, sir.

Q. 60 to 80 feet north of this hole?

A. Yes, sir, down here (indicating.) **[146—114]**

Q. Did Mr. Schlief fall off of the fender before the car stopped?

A. I don't know. I did not see anything of that.

Q You helped pick him up, I believe?

A. Yes, sir.

Q. Was he bleeding?

A. I don't know; I can't remember that.

Q. Was he conscious? A. Yes.

(Testimony of Mike Hanson.)

Q. Did he know what was being done; did he have his senses about him; understand what was being done? A. No.

Q. What did you do with him?

A. The inspector and me carried him into the hardware store.

Q. That is the building right in front of where this accident happened?

A. Yes, sir, right on the corner there.

Q. That is the building shown to the left in this picture? A. Yes, sir.

Q. What were you doing at that time?

A. Mixing mud.

Q. Where were you stationed; where was your mortar-box? A. Right there (indicating).

Q. How far were you from the hole?

A. 15 or 20 feet away from the hole.

Q. Toward the north? A. Yes, sir.

Q. Did you hear any bell rung on that car before it struck Mr. Schlief? [147—115] A. No, sir.

Q. Did you hear any gong or other whistle or noise of alarm? A. No.

Mr. EMERY.—That is all.

Cross-examination.

(By Mr. FALKNOR.)

Q. Did you hear any bell?

A. I didn't hear any bell before the car was stopped.

Q. Did you hear the bell?

A. No, not before the car was stopped.

Q. Did you hear the bell? A. Yes.

(Testimony of Mike Hanson.)

Q. You did hear a bell? A. Yes.

Q. Well, they didn't ring the bell after the car was stopped?

A. The bell was still ringing at this time the car stopped.

Q. The bell was still ringing after the car stopped?

A. Yes, sir.

Q. You heard the bell before the car stopped?

[148—116]

A. No.

Q. It was still ringing when it stopped?

A. Yes, sir. At this time when the car stopped.

Q. Still ringing? A. Yes.

Mr. FALKNOR.—That is all.

(Witness excused.) [149—117]

[Testimony of ——— Krogh, for Plaintiff.]

——— KROGH, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. EMERY.)

Q. You are one of the firm of Krogh & Jessen, contractors? A. Yes, sir.

Q. Were you the people that worked under a contract with the city? A. Yes, sir.

Q. Mr. Schlief was in your employ at that time?

A. Yes, sir.

Q. On your pay-roll? A. Yes, sir.

Q. Did you see the accident? A. Yes.

Q. Did you see him at the time the car struck him?

A. Yes.

(Testimony of ——— Krogh.)

Q. You know just where he was when he was struck? A. Yes.

Q. Where was he?

A. He was in the middle of the track straight in front of the car. [150—118]

Q. Whereabouts? A. Where is north?

Q. This is north (indicating) and this is south; (indicating) this is Cowan Park?

A. Well, he was right about there (indicating) about in the middle of the track between the two rails.

Q. What had he been doing just prior to that; as the car was approaching, what was he doing?

A. Why, he was here hauling some brick and mortar to hand down to the brick mason.

Q. Had he dumped the brick?

A. He had dumped the brick.

Q. Had he let go of the wheelbarrow?

A. Yes.

Q. Had he been to the hole already?

A. Yes.

Q. Had he passed any brick down after he emptied that load? A. Yes.

Q. Did he still have brick within reach to pass down?

A. The brick was laying right outside of the hole there. There was a plank laying across the edge of the hole for the men to step on so he could hand down the brick and mortar and he had to step off of that plank to take the brick and he was in the act—he had the brick in his hands and was going to turn around and hand them down in the hole as near as I

(Testimony of ——— Krogh.)

could see, and he lifted his right foot up there to step on that plank there and somehow or other he made a misstep and involuntarily he stepped out on the track; stepped right over in front of the track—I was standing on the sidewalk right [151—119] there and as he stepped over there I glanced down the track and there was the car within probably 12 feet.

Q. Was the car ringing any bell at that time?

A. I don't know.

Q. Did you hear any?

A. It did not come into my consciousness. I could not say whether I heard it or not.

Q. If it had been ringing you would have heard it?

A. I don't know. I think so. I saw Mr. Schlief there.

Q. The car was within 12 feet of him at that time?

A. Yes, sir.

Q. Do you mean by that the body of the car or the fender? A. The front end of the car.

Q. And the fender projects three or four feet in front of the car? A. Yes, sir.

Q. That must have been within four to six feet of him? A. Yes, sir.

Q. It was impossible for him to get out of the way?

Mr. FALKNOR.—I object to that as suggestive and leading.

The COURT.—Yes.

Q. In your judgment and experience, would it have been possible for him to get off and to have gotten out of the way after you saw him in that position?

(Testimony of ——— Krogh.)

Mr. FALKNOR.—I object to that as a conclusion.

The COURT.—That is a matter for the jury to determine after giving the conditions.

Mr. EMERY.—All right. I will withdraw the question.

Q. What was Mr. Schlief doing there? [152—120]

A. I don't think he saw the car because he turned half way around like he was going to come back. He wanted to come back over to the side where he was working.

Q. Was he facing south or north?

A. Well, he was kind of facing half way west and half way north; just like he was in the act of turning to come back to the place where he was working.

Q. If Mr. Schlief had stood still at the point where he stood to pass brick down, do you think he would have been hit by the car in passing?

A. No, the car would pass him.

Q. Could barely pass him? A. Yes, sir.

Q. But in case of any slip or misstep he would go right in front of the car?

Mr. FALKNOR.—I object to that as conclusion.

Mr. EMERY.—Perhaps that is argumentative.

Q. How near would he have been to the car if he had stood still?

Mr. FALKNOR.—Now, he cannot anticipate the accident.

Mr. EMERY.—Except the motorman on that car did not see him—

The COURT.—He may state the distance from

(Testimony of ——— Krogh.)
where he stood on the track.

A. Why the car track was paved; there was concrete paving on the track outside of the rail there just about 18 inches outside of the rail and Mr. Schlief, he was standing outside of that 18 inches.

Q. He stepped back onto it?

A. Yes, sir. In other words he was 18 inches away from the [153—121] east rail.

Q. The overhang of the car would be considerable, wouldn't it?

A. I don't know the width of the car.

Q. You don't know the width of the car?

A. No, sir.

Q. How wide is the track between the rails?

A. I can't tell.

Mr. FALKNOR.—The overhang is 18 inches; 16 or 18 inches I think. I don't know for sure. It don't overreach that concrete pavement.

The COURT.—I didn't understand the witness a while ago, but was the brick handed to this man on the same side of the track? A. Yes.

Mr. FALKNOR.—Yes, there was no occasion for him to cross the track at all.

Mr. EMERY.—There was no occasion for him to cross the track for material at all?

The COURT.—Yes, I understand the witness.

Q. The edge of this manhole to this excavation, did or didn't it extend back under the 18 inches of the concrete?

A. That extended back under the concrete.

Q. That extended back under the concrete and

(Testimony of ——— Krogh.)

under the ties? A. Well, under the concrete.

Q. Well, the ties were bedded in the concrete, weren't they? A. Yes, I guess they are.

Q. How far do you think he would be standing from the rail [154—122] in his ordinary position?

Mr. FALKNOR.—Well, the records show that standing at the center would be four feet and some inches.

The COURT.—He may answer.

A. Why, in the most natural position for him to work there he will be standing opposite the center of the hole.

Q. You mean exactly north of the center?

A. Well, on the north side—the side he was working on. The most easy way to work.

Mr. EMERY.—That is all.

Mr. FALKNOR.—I have no cross-examination.

(Witness excused.) [155—123]

[Testimony of Charles J. Schlief, in His Own Behalf (Recalled).]

CHARLES J. SCHLIEF, the plaintiff, being recalled, as a witness in his own behalf, having already been duly sworn, testified as follows:

Direct Examination.

(By Mr. EMERY.)

Q. I will ask you, Mr. Schlief, now, whether or not to your knowledge you stepped upon any loose board that gave and caused you to make a misstep and spring onto the tracks.

Mr. FALKNOR.—That is objected to. I asked

(Testimony of Charles J. Schlief.)
that time and time before.

The COURT.—The witness testified this morning.

Mr. EMERY.—Unless there is something that has come to his attention since.

A. No, sir, I don't know.

The COURT.—He has testified to that this morning.

Mr. FALKNOR.—I asked him that this morning.

Q. (Question read.) A. No, sir, I did not.

Mr. FALKNOR.—You don't know whether you did or not. A. No.

Q. (By Mr. EMERY.) If you did, it was involuntary, was it?

Mr. FALKNOR.—I object to that. [156—124]

The COURT.—Objection sustained.

Mr. EMERY.—I think that is our case, with this exception, I stated to counsel and he kindly consented to admit the American Mortality Tables of this man's expectancy. He was 42 years of age when this accident happened and I think his expectancy is 27 years.

Mr. FALKNOR.—Whatever you say.

Mr. EMERY.—I think it will be admitted that the expectancy according to the American tables of mortality is 27 years. That is all.

(Witness excused.)

Plaintiff rests.

Mr. FALKNOR.—What is the practice in regard to the argument of motions? Are they in the presence of the jury or not?

The COURT.—Why it is usual, I think, to make them in the absence of the jury.

(Jury is excused from the courtroom).

Mr. FALKNOR.—The defendant at this time moves your Honor for a judgment of nonsuit for the reason that the plaintiff has wholly failed to establish any cause of action against the defendant; second, for the reason that the plaintiff's evidence shows that he was guilty of contributory negligence which was the proximate and sole cause of the accident; three, for the reason that the plaintiff was engaged at the time in the performance of work within the scope covered by the Workmen's Compensation Act and at the plant of the **[157—125]** employer, within the terms and limitations of said Act. (Argument.)

(Adjournment until ten o'clock A. M., January 9th.) **[158—126]**

[Proceedings Had January 9, 1914, 10 A. M.]

January 9th, 1914, Ten A. M. Session.

(Argument on motion continued.)

The COURT.—Now, I am frank to say to both of you gentlemen that I have great doubts about the legal status of the case and of course the proper course is to search out and follow as nearly as may be the true intent of the legislature and accept that sense of the Act—the words which are used which harmonize best with the context and promotes with the fullest measure the apparent policy and object of the legislature. Now, when we consider this Act, the primary purpose or course is to provide for the

injured workmen. And second for the industries of the State. The Act says,—quoting from the section which I read a moment ago—"The welfare of the State depends upon its Industries, and even more upon the welfare of its wage-worker." So I think that it can clearly be said that in the enactment of this measure, the legislature had in mind, first the workmen and next the industries. This Act mediates between the employer and employees' provision for compensation for injury and disability, irrespective of fault or negligence, and as stated a moment ago, the Act abolishes the statutory right of the party and of the wife or children to sue for the death of the husband and father, and it likewise takes away the common-law remedy which is afforded to the injured workman to sue his employer for negligence for any injury which may have been occasioned to him. The further construction of this statute [159—127] and the expressions used is where the question of doubt arises in this case. Taking the use of the word "plant" under the exception, and then taking the definition as given under the Act under section three of this Act, an institution such as disclosed by the testimony in this case as the employer of the plaintiff, does not seem to be given any position. I am going to deny this motion. This is a matter that can be disposed of at a more mature deliberation and consideration and can all be disposed of upon one appeal and the whole matter might as well be submitted in the final disposition of it rather than to dispose of it in a motion for nonsuit. The Court will hear the entire case and then make

final disposition. The motion is denied. Bring in the jury.

Mr. FALKNOR.—The Court allows me an exception?

The COURT.—Oh, yes; exception allowed.

(Jury returned into court.)

(Opening statement made to the jury by counsel for the defendant.) [160—128]

[Testimony of Dr. H. B. Thompson, for Defendant.]

Doctor H. B. THOMPSON, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. FALKNOR.)

Q. Doctor Thompson, you are a practicing physician? A. Yes, sir.

Mr. FALKNOR.—Do you admit his qualifications?

Mr. EMERY.—I would like to know how long he has practiced.

Q. How long have you been practicing?

A. Seven years.

Q. Where? A. Eight years.

Q. Where have you practiced seven years?

A. Why, I first was in the Northern Pacific Hospital in Tacoma for a year. I practiced up at Elby in Washington for nearly a year and since that time I have been in Seattle.

Q. You were formerly one of the physicians of the company? A. Yes, sir.

Q. When did you sever your relations with the company? A. The 4th of last November.

(Testimony of Dr. H. B. Thompson.)

Q. You are not now in the employ of the company?

[161—129] A. No, sir.

Q. Now, while you were in the employ of the company as one of its physicians did you see the plaintiff in this case? A. I did.

Q. Do you remember where it was you saw him?

A. I saw him first at the store out on 14th Avenue northeast, in the University district, and then I accompanied him with Doctor McKinney into the Seattle General Hospital.

Q. Now, did you take any X-rays to determine the extent and character of his injuries?

A. Yes, sir.

Q. Now, what injuries did you find that he had sustained in that accident?

A. There was a bump on the left side of his forehead where the skin was cut a little and there was some swelling, and his left ankle was considerable swollen and discolored. He complained of pain in the right side of his chest, but there were no marks of injury there.

Q. How did you endeavor to determine with Doctor McKinney, whether there was any fracture of any of the ribs?

A. We both examined him there and aside from general tenderness of which he complained, there was no evidence of a fractured rib. That is, there was no crookedness and we could not push the ends of a *broken together* so that they would creak or make a noise, or so that you could feel it. There was no deformity, and there was no definite point of

(Testimony of Dr. H. B. Thompson.)

tenderness as there usually is when a rib is broken. [162—130]

Q. You could not find any evidence of a broken rib then? A. No, sir.

Q. Now, did you take an X-ray of his left ankle?

A. Yes, sir.

Q. I will ask you to look at that and state whether that is an X-ray you took of his left ankle.

A. Yes, there are two pictures on this one plate.

Q. That shows the condition of the fracture does it? A. Yes, sir.

Mr. FALKNOR.—I would like that this be marked Defendant's Exhibit 8, and then I will ask you to show it to the jury.

The COURT.—It may be marked.

(X-ray plate in question received in evidence and marked Defendant's Exhibit 8.)

Q. Now, Doctor Thompson, if you will stand down before the jury and explain to them which bone was injured and which bone was not injured?

A. It is pretty hard to get this so that they can see it. This plate was taken so that the two pictures was taken on the same plate. The first picture on the plate—the plate was covered with a piece of paper so that it was not exposed and then the lens was shoved over a little further and this picture was taken. I have written on one side of this "front view," that is a view taken directly from the front to the back. On the other side is a side view, from the outer side, taking the picture through from side to side. In the front view, there is the large bone

(Testimony of Dr. H. B. Thompson.)

and the small bone; they appear to be [163—131] side by side (indicating). In the side view the small bone is to the outer side and in the back of the large bone at the bottom where the large bone is large enough to cover over the small bone. Now, you can see plainly the break in the small bone, extending from about this point (indicating) to two inches above the lower end of the small bone, extending diagonally down and forward across the small bone. Now, this crack, you can see through the large bone. It might create a wrong impression. You apparently see a crack in the larger bone, but it is really a continuation of the crack in the small bone, and the large bone simply overshadows it in the side view. In the front view I can make out that there is a crack across there, but a person not used to looking at an X-ray would not be able to tell from the front view alone that there was any break in the small bone.

Q. Now, explain which is the large bone.

A. The large bone is the one to the left.

Q. That was not in any wise affected?

A. No, sir.

Q. But the fracture was in the small bone extending—take this one to the left—extending from what point to what point? Mark it.

A. Extending from here (indicating) down to there (indicating), but it lies in this plane; the plane that is in the same plane as my hand, so that you can see the crack; also the fragment is in that position, and also the upper fragment, and the crack comes across this way, so that the crack is apparent in the

(Testimony of Dr. H. B. Thompson.)

side view and not in [164—132] the front (indicating). That picture was taken immediately upon his admission to the hospital and before anything was done.

Q. Now after the picture was taken was the fracture reduced and the bones put in their natural position?

A. They are practically in their natural position there; no change was made in the position of the bones because they are in position there; simply putting them up in a plaster cast.

Q. Was there any injury to his left foot?

A. Not below the ankle; there was an injury to the ankle.

Q. Not below the line of this fracture?

A. Yes, there was some injury below the line of that fracture. There was an injury to the ankle joint which is below the line of fracture. There was no injury to the foot whatsoever.

Q. There was no injury to the foot itself?

A. No.

Q. Well, was there any injury to the bones in the arch of the foot? A. No, sir.

Q. About in what time, Doctor Thompson would you think, or about in what time, did the plaintiff make a recovery, do you think?

A. Why, probably in about ten weeks he could walk on the foot with quite a good deal of comfort. At the end of three months he ought to be fairly well. It might bother him some for a considerable time

(Testimony of Dr. H. B. Thompson.)
after that. In doing heavy work or being on his feet a long time.

Q. Doctor, in your judgment was there any permanent injury? [165—133]

A. No, I don't think there would be.

Q. Now, Doctor, did you last night take some X-rays with the view of determining whether or not there had been any injury to his left foot?

A. Yes, sir.

Q. Are these the X-rays as taken? A. Yes, sir.

Q. Those are the X-rays that were taken?

A. Yes, sir.

Q. One of the left foot and one of the right?

A. Yes, sir.

Mr. FALKNOR.—We ask that these be received and marked as Defendant's Exhibits 9 and 10.

The COURT.—Let the exhibits 7, 8, 9 and 10, all be admitted.

(X-ray plates in question received in evidence and marked Defendant's Exhibits 7, 8, 9 and 10 respectively.)

Q. Now, showing you Defendant's Exhibit 9, that is which foot? A. That is the left foot.

Q. The left foot? A. Yes, sir.

Q. Now, by a comparison of the X-rays of those two exhibits 9 and 10, what do they show? What does the present condition show?

A. Why, in comparing the two feet, they are as near alike as any two feet you could ever get on the same individual. There are no two feet exactly alike. The bones of a person are slightly different the same

(Testimony of Dr. H. B. Thompson.)

as the features of a [166—134] person, but the position of the bones and the entire X-ray are as near alike as two pictures of two different feet could possibly be.

Q. What would be your opinion, Doctor, as to whether the flatness of the left foot has any relation whatever to this accident?

A. I don't think it has.

Q. Why do you say that, Doctor?

A. In the first place the injury was of such a nature that it could not produce a flat foot. Unless there had been some outward displacement of the lower fragment—the lower piece of the broken bone, —if that had been displaced outward it would have turned the ankle outward and allowed him to walk on the inner side of his foot, but as long as that was perfectly straight as it is normally it could not produce a flat foot. From my examination of his feet yesterday and also last night, the feet are exactly the same. If there is any difference, the right foot is a little more flat than the left.

Q. The one that was not injured in the accident is a little more flat than the left one? A. Yes, sir.

Q. Now, did you make any demonstration with imprints?

A. Yes, sir, I did. I would like to explain these marks that I put on these plates before the jury.

Q. Yes.

A. In measuring the height of the arch we draw a line from the bottom of the heel bone across the bottom of the foot to the bottom of the bone at the base

(Testimony of Dr. H. B. Thompson.)

of the big toe. Then if you take a piece of paper with right-angle corners, [167—135] and lay it on this base line so as to get a perpendicular line, you can measure from here up to the top of any of those bones in the arch of the foot and in what we call the tarsal bone you will find that the perpendicular distance from this base line to any of these bones is exactly the same, as near as you could measure it on the two plates, on the left and the right. These marks were just put on the outside with pencil so that you can lay it down on the table and see it.

Q. Now, recurring to my former question, I will ask you what examination you made with imprints.

A. The bottom of his feet were inked and then he was asked to step first on one piece of paper with the left foot and then on another piece of paper with his right foot; just asked to step along, three steps, and in the middle step he stepped on one of these pieces of paper with first one foot and then the other.

Q. Now, have you got those imprints?

A. Yes, sir.

Mr. FALKNOR.—We ask that these exhibits be received in evidence and marked as Defendant's Exhibits 11 and 12. Do you want to see them first, Judge Emery?

Mr. EMERY.—I saw them taken. Better mark one of them "right" and the other one "left" so we will know which they are.

Mr. FALKNOR.—I think we could tell which one was the right and which was the left foot.

Mr. EMERY.—I think so, but it might be just as

(Testimony of Dr. H. B. Thompson.)

well to have them properly marked.

The COURT.—If there is no objection, let them be admitted. [168—136]

(Imprints in question received in evidence and marked as Defendant's Exhibits 11 and 12 respectively.)

Mr. EMERY.—Let the Doctor mark "right" and "left" on them, so that there will be no question.

Q. Yes. Just mark "R" on the one that is right and "L" on the left one.

(Witness marks as directed.)

Q. Now, Doctor Thompson, you may explain these imprints to the jury, using the exhibits.

A. Well, with the bottom of the foot inked, of course any portion of the foot which comes in contact with the paper will leave a mark. Now, in the foot with the high arch, the inner side of the arch will not come in contact with a flat object placed on the floor so that you could get an imprint of the heel and also the ball of the foot with an imprint along the outer side of the foot, leaving a large cavity which corresponds with the arch of the foot, and the higher the arch of the foot the greater will be this indentation (indicating), with the exception that some people with high arches will not give as small a mark or as great an indentation on account of the effect of the person's foot. But if you will compare two feet of the same individual, that has the same amount of fat on the two feet, you can get an idea as to which arch is higher with the same individual, and if you will compare this mark with the mark made by the

(Testimony of Dr. H. B. Thompson.)

foot of another individual it would not be very accurate on account of the different amount of fat that there is on each different individual, but with the same individual, it gives a [169—137] fairly accurate idea.

Q. Now what was the result of your test, Doctor?

A. Well, the left shows a much narrower mark through the arch than does the right foot. That shows that the right arch bends down under the weight of his body more than does the left.

Q. That is the foot that was not injured, bends down further than the foot which was injured, or the leg that was injured?

A. Yes, sir. They are very nearly alike. There is not a great deal of difference, but what difference there is is in favor of the right foot.

Mr. FALKNOR.—Will you admit that the city of Seattle remitted to the State for the benefit of the fund of the State Industrial Commission and the Workmen's Compensation Act, the assessment collected on the property on the improvements that the plaintiff was engaged at at the time; I have Mr. Kelly here from the city, but I thought if you would admit that, I could excuse him.

Mr. EMERY.—You mean to say that the State paid the assessment on the work on which it employed Krogh & Jessen?

Mr. FALKNOR.—And charged it up against Krogh & Jessen.

Mr. EMERY.—Yes, I will admit that if you say it is a fact.

(Testimony of Dr. H. B. Thompson.)

Mr. FALKNOR.—On this individual job.

Mr. EMERY.—Oh, yes, the city paid it for Krogh & Jessen.

Mr. FALKNOR.—On this individual job.

Mr. EMERY.—Yes, I will admit that if you say so.

Mr. FALKNOR.—Very well.

Q. Doctor Thompson, was there anything further that you wanted to state in regard to your examination last night [170—138] other than I have asked you? A. No, I don't think of anything.

Mr. FALKNOR.—That is all.

Cross-examination.

(By Mr. EMERY.)

Q. What school are you a graduate of?

A. Rush Medical College, Chicago.

Q. What is your age? A. 31.

Q. You must have graduated there at 23 or 24?

A. Yes, sir, something like that.

Q. Did you have any practice in the hospitals of Chicago?

A. I had charge of the X-ray Laboratory for the Presbyterian Hospital before I came out here.

Q. For how long were you engaged in that business?

A. I was in the X-ray Laboratory there for two years.

Q. Your business was making X-ray pictures?

A. Yes, sir.

Q. Did you have any general practice during that time in surgery? A. Not during that time, no.

(Testimony of Dr. H. B. Thompson.)

Q. So that then for two years of your seven since your [171—139] graduation you were engaged as an X-ray artist?

A. No, this two years was before my graduation; that is 18 months before and 6 months afterwards.

Q. What was the work you undertook after you graduated; surgical work?

A. I served as intern in the Northern Pacific Hospital at Tacoma.

Q. How long were you there?

A. I was there about a year, or nine months.

Q. Did you do any X-ray work there?

A. Yes, sir.

Q. Do any surgical work? A. Yes, sir.

Q. What surgical work?

A. Assistant to Doctor Allen, the Chief Surgeon there.

Q. You handled the bandages and instruments while he set the bones?

A. I wouldn't want to tell you what I did.

Q. Now that was 9 months; what was the next work that you did?

A. Practiced as a general practioner at Elby.

Q. How long were you there?

A. I was there eight or nine months.

Q. Did you have a large number of surgical cases there? A. No, sir. I had some.

Q. Nine and nine is 18; now that is a year and a half; now what did you do next?

A. I came to Seattle.

Q. Where did you locate here?

(Testimony of Dr. H. B. Thompson.)

A. In the Empire building with Doctor Willis.

[172—140]

Q. And had a general practice? A. Yes, sir.

Q. Were you engaged in either the hospitals at that time or soon thereafter?

A. Yes, I have had charge of the X-ray Laboratory in the Seattle General Hospital ever since it was installed.

Q. How long ago was that?

A. Oh, that was about 5 years ago.

Q. Have you had extensive general practice in the city or have you confined your work largely to X-ray work?

A. No, I have had general practice, acting as assistant to Doctor Willis beside my X-ray work.

Q. How long were you engaged by the Seattle Electric Company, the defendant, in their work; as an expert for them?

A. I acted as an assistant to Doctor Willis from the time I came to Seattle until about two months ago; about 6 years.

Q. You have testified as an expert for the company in a good many cases, haven't you?

A. Some cases.

Q. Well, a good many cases haven't you?

A. It depends on what you call a good many.

Q. How many cases have you testified in as an expert for the company, about?

A. Oh, it would be pretty hard to tell.

Q. 75 or 100 cases? A. No, not that many.

Q. 50 or 60 cases?

(Testimony of Dr. H. B. Thompson.)

A. Well, I would put it at about 50 probably in the six years. [173—141]

Q. Always on the part of the company and at the company's request? A. Why if my testimony—

Q. (Interrupting.) —always on the part of the company?

A. Why, if my testimony would not help them they would not call me.

Q. You have always been called and testified for the company? A. No, sir.

Q. You have been called by the other side and testified against the company? A. Yes, sir.

Q. In cases in which the company was interested?

A. I think I was in one case.

Q. Now, Doctor Thompson, your opinion is the arch of the foot or the bones of the arch, the tarsal and the metatarsal bones, those constitute the arch, don't they? A. Yes, sir.

Q. Your opinion is that these bones were not in any way injured? A. Yes, sir.

Q. In this man's foot? A. Yes, sir.

Q. You base that opinion upon these X-ray pictures?

A. I base that on these X-ray pictures and also on my first examination.

Q. Did you examine the foot at that time?

A. I certainly did.

Q. What did you do toward that examination?

A. I examined it with Doctor McKinney and I helped him fix [174—142] it up and put it in a plaster cast.

(Testimony of Dr. H. B. Thompson.)

Q. You put the plaster cast on the foot, did you?

A. Put it on the entire leg from the knee down to the base of the toes.

Q. What did you enclose the foot in that plaster cast for if it was not hurt?

A. It is customary in a fractured ankle—

Q. Then the ankle was fractured?

A. Well, we call it a Pott's fracture of the ankle when the small bone—

Q. What constitutes the ankle?

A. There is three bones go to make up the ankle joint.

Q. That is the astragalus, that is one?

A. That is one; the tibia and the fibula is the other. The fibula does not really go to make up a part of the ankle.

Q. Doesn't the external malleolus pass down over that and constitute the ankle joint and isn't the external end of the tibia and the fibula respectively?

A. Yes, but the fibula itself is not connected directly with the joint cavity.

Q. But the bone protects the joint cavity?

A. Yes, sir.

Q. If I was to call it, I would call it my ankle bone—this thing? A. Yes, sir.

Q. That is the end of the fibula? A. Yes, sir.

Q. The tibia is the inner bone? A. Yes, sir.

Q. And the fibula is the outer bone? [175—143]

A. Yes, sir.

Q. The tibia is the larger and the fibula the small bone? A. Yes, sir.

(Testimony of Dr. H. B. Thompson.)

Q. Was there any trouble with the ankle joint other than the point of the fibula that you say was broken? A. Yes, sir.

Q. What was the trouble?

A. The ankle joint itself was badly sprained.

Q. What does the sprain involve about the bones; anything?

A. Why it involves the tearing and stretching of the ligaments attached to the bones.

Mr. EMERY.—That is all, Doctor. No further questions.

Redirect Examination.

(By Mr. FALKNOR.)

Q. That had no connection with these bones down in the arch of the foot? A. No, sir.

Mr. EMERY.—Just a minute; I will ask one further question. **[176—144]**

Cross-examination (Resumed).

(By Mr. EMERY.)

Q. You think that this man is not limping at this time at all?

A. Why, I don't know about that. I wouldn't want to say whether he is or is not. I have his word for it.

Q. Might it be possible that he is telling the truth about having pain in this part of his foot?

A. Certainly.

Q. It might be possible that he is telling the truth about that? A. Certainly.

Q. That would constitute an injury to the arch of his foot? A. No, sir.

(Testimony of Dr. H. B. Thompson.)

Q. Indicate an injury to the arch?

A. No, sir.

Q. The tendons compose a part of the arch?

A. No, sir.

Q. What would cause pain down there if he did not have any injury; his imagination?

A. No, sir.

Q. Oh, that is all. If you can't tell, that is all right. **[177—145]**

Redirect Examination.

(By Mr. FALKNOR.)

Q. Doctor Thompson, in your manipulation and examination, did you find any evidence of anything that would cause pain there?

A. I could not find any evidence of anything, no.

*Q. *tion or examination, there is no eing wrong there that would cause*

A. No, as far as you could find out from examination. Still the man might have pain.

Q. (By Mr. EMERY.) You are willing to state that it might be possible that some of these tendons in the bottom of his foot were strained and hurt?

A. I don't think so; not at the time of this accident.

Q. (By Mr. EMERY.) Do you think it might have been done since?

A. The pain might have come on since then. I think the pain is probably due to a slight amount of flat foot which he has.

*Omitted portions of question do not appear in original certified typewritten record because of defective carbon copy.

(Testimony of Dr. H. B. Thompson.)

Q. (By Mr. FALKNOR.) Does a flat foot, irrespective of an injury, tend to induce pain?

A. Yes, sir.

Q. Then if he has any pain there it would be probably the natural pain resulting from a natural flat foot? A. Yes, sir.

Mr. FALKNOR.—That is all.

(Witness excused.) **[178—146]**

[Testimony of Dr. Bruce Elmore, for Defendant.]

Doctor BRUCE ELMORE, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. FALKNOR.)

Q. You are a physician?

Mr. EMERY.—We will admit Doctor Elmore's qualifications without any question.

Q. What experience have you had relative to the examination of flat feet?

A. The experience of examining men for the United States Navy.

Q. Covering what time?

A. Off and on for about eight years.

Q. In that time you have probably had occasion to examine how many flat feet?

A. Oh, it is in the thousands; it is somewhere in the thousands because we run—when I was stationed in Washington, I would have a whole trainload of them; several hundred of them as fast as we could.

(Testimony of Dr. Bruce Elmore.)

Q. About what per cent of people are afflicted with flat feet?

A. Of the candidates for the navy that we examine, approximately **[179—147]** we turn down 12 per cent of the applicants, for flat feet.

Q. You examined the plaintiff last night did you?

A. Yes, sir.

Q. What did you find with reference to his feet?

A. Why, I can explain that best with my little ruler which is a method—

Q. Just do it please.

A. This little rule which I have devised and published and is being established now in the navy, in the detection of flat feet. You can see how the skeleton forms the arch and therefore the flesh doesn't make any difference. This external malleolus, I have devised this little rule—first I have a man stand on his toes to see how much give there is and I record whether they are lax or rigid; that is, whether the ligaments are held up pretty well, and then with this measure I measure and record in eighths of an inch; I see what relation this bears to this line (indicating). I found on examination of this man—I think it is his right foot is one-fourth below and his left a third.

Q. Which is flatter?

A. His right. They are very close. That is only one-eighth of an inch, you understand.

Q. The right foot a little flatter than the left?

A. I made it four-eighths below.

Q. What would you say about the flatness of his

(Testimony of Dr. Bruce Elmore.)

left foot, if any, with relation to any accident?

A. Why, I don't think there is; I don't think it has any relation to an accident. I don't think his foot is flat. [180—148]

Q. Explain what you mean.

Mr. EMERY.—Oh, that is not a proper question.

The COURT.—I think he may answer.

A. What I mean is this: If I just examine that man's foot, say he came and applied for enlistment, and he did not say anything about having any pain or anything else, I think I would admit him to the navy for this reason, that it has been established on some records I have kept, and I admit all up to four-eighths and a half an inch below, because on those recorded cases which I have been working on for about three years, I find that after they get into the service they do not have trouble with their feet. Those above,—but about four-eighths or a half an inch below is the danger line.

Q. Yes. It isn't so flat but what you would admit him to the navy?

A. No, I would on the measurements alone.

Q. But his feet are flatter than some of the rest of us? A. Oh, yes. They vary a good deal.

Q. But do you think his feet are in their natural condition; that is, whatever flatness he has comes from natural conditions?

A. I should say they are about the same as they always have been, probably, as far as the arch goes.

Mr. FALKNOR.—That is all. [181—149]

(Testimony of Dr. Bruce Elmore.)

Cross-examination.

(By Mr. EMERY.)

Q. Did you ask this man about any injury having happened to the foot?

A. Yes, I asked the usual questions.

Q. You haven't any reason to doubt the truth of Doctor Thompson's statement that he found on January 23d a break on the point of the fibula?

A. No, I have no reason to doubt that.

Q. That is, he found the injury; a spraining of the ankle joint, which is generally between the astragalus, the calcis and one of the cuneiform bones and the scaphoid on the other?

A. No, that is not. It is the connection between the astragalus and the tibia on the one hand, and the external malleolus coming down on the outside.

Q. Now, he says that the bones of the ankle,—the tendons and cords of the ankle had been sprained. Doctor Thompson says that. Doctor McKinney testified that there was some injury to the foot which he could not determine the extent of, but the foot was swollen. Both the doctors testified that they put that foot in a plaster cast clear down to the base of the toe and stayed there for the proper length of time, and the man has testified and it isn't so far beyond question that he suffered pain in this part of his foot ever since, and Doctor McKinney testified that, knowing that fact, [182—150] and finding it to be true, he put a pad under his foot, and he has been wearing it there for six months, which pad is a half an inch high? A. Yes, sir.

(Testimony of Dr. Bruce Elmore.)

Q. Now, would that fact have any bearing in your mind towards showing that an injury had occurred to the arch of the foot or the tendons and cords composing the arch?

A. I could believe that the man had pain, but beyond absolute physical finding—

Q. Now doctor.

Mr. FALKNOR.—Just a moment. Let the witness answer.

The COURT.—If you have not finished your answer you may do so.

Mr. EMERY.—Yes, he may answer the question.

A. All I want to say is that from actual physical findings I can determine no evidence of injury.

Q. But from the history of the case, if that is true, there was some injury there?

A. If that were true.

Q. As long as the pain continued there is some evidence that there was some injury there?

A. Not necessarily due to injury; I don't know what the pain is due to.

Q. Do you think that pain will follow?

A. Yes, sir.

Q. What would cause pain in the tendons and cords of a man's foot?

A. You can have pain from neuritis or rheumatism—

Q. If you found pain that you know comes from an injury of the foot and that same pain continues right along for [183—151] months, even to the present moment, wouldn't that indicate to you, if

(Testimony of Dr. Bruce Elmore.)

you believed that to be true, that the man had an injury to his foot?

A. It would indicate that he may have.

Q. Why certainly. Now, if you knew that fact you would probably be influenced some in your judgment about taking him into the navy, wouldn't you?

A. If he complained of pain and said he couldn't walk, I would not admit him to the navy.

Q. Of course not. You haven't anything to indicate to you anything different but what this man's testimony is truthful, have you?

A. As far as I know at present.

Q. And but what Doctor McKinney's testimony is truthful?

A. Certainly; I have no knowledge of that at all.

Redirect Examination.

(By Mr. FALKNOR.)

Q. What did he tell you about any injury to the foot when you asked him if the foot had been injured?

A. I asked him, as I always do candidates—I went at him just the same as if he were applying for the navy, and I asked him if he had had any accident, and he said, "None, [184—152] except I broke my leg a certain length of time ago"—I said, "How long have you been able to go to work?"

Mr. EMERY.—Now, just wait a moment. I heard that testimony.

A. Yes, you were present there.

(By Mr. EMERY.)

Q. He told you to the foot too, didn't he?

(Testimony of Dr. Bruce Elmore.)

A. He said, the leg and the foot.

Q. Yes.

A. I said, "How did you do it?" Well, he said he was hit by a car and that he was laid up and I asked him when he was able to go to work and he told me in months. I don't remember what time. I asked him if it hurt now and he says, "Yes, it sometimes does. It does hurt now." Then I examined his foot and the history of the case says that he has pain. That may be true. It is undoubtedly true.

Q. (By Mr. FALKNOR.) Could you find any evidence of anything that would cause pain?

A. I could not find any physical evidence of anything that would cause pain.

Q. It is easy to say a person has pain and there is no way to disprove it, is there? A. No, sir.

Mr. FALKNOR.—That is all.

Q. (By Mr. EMERY.) You would not have any occasion to believe this man has been shamming all this time, would you? A. No, sir, none whatever.

Q. (By Mr. EMERY.) Or that Doctor McKinney had been shamming about it? **[185—153]**

A. None whatever.

Mr. EMERY.—No, of course not. That is all.

(Witness excused.) **[186—154]**

[Testimony of Dr. H. B. Thompson, for Defendant (Recalled).]

Doctor H. B. THOMPSON, being recalled as a witness on behalf of the defendant, having already been duly sworn, testified as follows:

(Testimony of Dr. H. B. Thompson.)

Direct Examination.

(By Mr. FALKNOR.)

Q. Mr. Thompson, something has been said about the foot being put in a cast with the rest of the leg. Explain why that was done.

A. Why, the first rule in surgery is to immobilize the joints both above and below that injury; so that if you have a break of the knee you immobilize not only the knee but you immobilize the hip and the ankle; if you have a fracture of the ankle, the common rule is to enclose the entire foot and also the knee in the cast. This man's knee was not enclosed in the cast because there was so little displacement of the bone, but the cast extended up to the knee.

Q. You did not immobilize the foot because of any jury to the bone in the foot? A. No, sir.

Q. But because of the rule of surgery in reference to the fractured bone? A. Yes, sir. **[187—155]**

Mr. FALKNOR.—That is all.

Mr. EMERY.—That is all. I would like to recall Doctor Elmore.

(Witness excused.) **[188—156]**

[Testimony of Dr. Bruce Elmore, for Defendant (Recalled—Cross-examination).]

Doctor BRUCE ELMORE, being recalled as a witness on behalf of the defendant, having been already duly sworn, testified as follows on

Cross-examination.

(By Mr. EMERY.)

Q. Doctor Elmore, isn't it true that a severe injury to the joint and particularly to the ankle joint may

(Testimony of Dr. Bruce Elmore.)

cause—and this knee joint, may cause prolonged and continuing injury to that joint without there being any outward physical manifestations of it?

A. That is true.

Q. That is true? A. Yes, sir.

Mr. EMERY.—Well, that is all.

Redirect Examination.

(By Mr. FALKNOR.)

Q. If it is any very extensive pain it will affect the pulse rate? [189—157]

A. It might or might not. There would not be anything very definite about that.

Mr. FALKNOR.—That is all.

(Witness excused.) [190—158]

[Testimony of R. B. Nelson, for Defendant.]

R. B. NELSON, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. FALKNOR.)

Q. You were the motorman, were you?

A. Yes, sir.

Q. How long had you been in the employ of the company? A. Since the 15th of November.

Q. When did you cease to be in the employ of the company?

A. The 26th of this last December, 1913.

Q. Had you ever had any experience as a motorman previous to that time? A. Yes, sir.

Q. Where? A. Eugene, Oregon.

(Testimony of R. B. Nelson.)

Q. Now, Mr. Nelson, you were there in charge of the car. Tell the jury how this accident happened.

A. Well, I was going down 14th Avenue Northeast and I was going about—I was going about 6 or 7 miles an hour and I rang my gong about 20 or 30 feet from where these workmen were working and as I got about 5 feet from this manhole, this man stepped on a loose plank and [191—159] fell or maybe jumped, like he was trying to get out of the way and fell right on the middle of the track.

Q. If he had remained where he was, would your car have gone past without hitting him?

A. Yes, sir.

Q. He was within 5 or 6 feet of you when he jumped in front of the car? A. Yes, sir.

Q. Did you do all you could then to stop the car?

A. Yes, sir.

Q. About how far did your car go after you hit him? A. About 20 feet.

Cross-examination.

(By Mr. EMERY.)

Q. What was the size of this car?

A. Well, I don't know just the length of those cars.

Q. Can you give approximately the length of it?

A. About 35 feet, if I could judge.

Q. Do you mean 35 feet over all?

A. No, just the car.

Q. Not including the entrance point?

A. From the head end of the car to the rear end of the car. [192—160]

Q. How much does the fender project in front of

(Testimony of R. B. Nelson.)

that? A. I should judge just about three feet.

Q. How far?

A. I should judge about three feet.

Q. Where was he when you first saw him?

A. He was bending over at the north of the manhole.

Q. Looking down in the manhole?

A. I couldn't say as to that.

Q. Did he have anything in his hand?

A. I couldn't say as to that.

Q. Who else was there at that time near him?

A. Nobody that I saw.

Q. Nobody that you saw; did you see a man working in the manhole? A. Yes, sir.

Q. Did you see Mr. Kumpf standing three feet or four feet from him to the side?

A. I don't know that I did.

Q. You didn't notice him, but you did notice how far Mr. Schlief was from the track? A. Yes, sir.

Q. You looked for that, I suppose, to see if your car would clear? A. Yes, sir.

Q. You had the usual appliances on this car for stopping it, didn't you? A. Yes, sir.

Q. They were all in good condition?

A. Yes, sir.

Q. Had an air-brake? [193—161]

A. Yes, sir.

Q. What is that; Westinghouse pattern?

A. The National.

Q. That is a three-way valve?

A. No, I think not.

(Testimony of R. B. Nelson.)

Q. Only a two-way valve; how do you discharge your air? A. It was a single release.

Q. What pressure were you carrying on the air-brake? A. About 70 pounds.

Q. Do you know whether you had 70 pounds on that car at that time or not? A. Yes, sir.

Q. Where did you start to slow down the car?

A. Well, I was slowing down all the time; I was just drifting down the hill.

Q. You rang the bell about 30 feet before you got there? A. Between 20 and 30 feet.

Q. How far were you from that place before you saw that man first?

A. Well, I saw the man—I was up there to the top of the hill when I first saw him.

Q. Two or three blocks? A. Yes, sir.

Q. Six or eight hundred feet? A. Yes, sir.

Q. How many men were there?

A. Five or six, I guess.

Q. Plain view all the time? A. Yes, sir.

Q. Had complaint been made to you by any of the men on that [194—162] work there about running by there too fast? A. No, sir.

Mr. FALKNOR.—Just a moment. That is not competent.

Q. What gong—what kind of a gong have you on that car? A. Called a rotary gong.

Q. One that when you touch it it will ring for some time? A. Yes, sir.

Q. And ring pretty loud? A. Yes, sir.

Q. Makes a pretty loud noise? A. Yes, sir.

(Testimony of R. B. Nelson.)

Q. Under ordinary conditions, that gong would be heard about two or three blocks?

A. About two blocks, I should judge.

Q. You think under the conditions that prevailed there that gong could have been heard there two blocks easily? A. Yes, sir.

Q. Nothing making any unusual noise?

A. No, sir, only the car.

Q. No concrete mixer or anything of that sort going there? A. Nothing but the car.

Mr. EMERY.—That is all.

(Witness excused.) **[195—163]**

[Testimony of R. E. Ward, for Defendant.]

R. E. WARD, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. FALKNOR.)

Q. You were the conductor on the car?

A. I was, yes, sir.

Q. When did you first see the man?

A. When they were picking him up right beside the car.

Q. You didn't see him before? A. No.

Q. How long have you been conductor with the company?

A. I have been here since the 7th of September, 1912.

Q. You are in the employ of the company now as one of its conductors? A. Yes, sir.

Q. About what speed do you think your car was

(Testimony of R. E. Ward.)

going down there at the time just previous to the accident?

A. Well, I should say we wasn't going a bit more than 7 miles an hour; between 6 and 7. I don't think it was a bit more than seven.

Q. What attracted your attention to this accident?

A. Well, the car came to a sudden stop that way. I heard [196—164] something strike against the front end of the car and then the car came to a sudden stop.

Q. Had you heard the bell; did you observe the bell; had your motorman sounded any bell as he came down there?

A. Well, we was drifting down there at a very slow speed; about 7 miles an hour, and I was just fixing up the trip sheet.

Mr. FALKNOR.—That is all.

Cross-examination.

(By Mr. EMERY.)

Q. Was the car stopped with the emergency brake? A. Yes, sir.

Q. A very sudden stop?

A. Very sudden for I picked myself up about halfway up in the car.

Q. It threw you halfway up in the car?

A. Threw me way up to the cross-seats.

Q. Did you have very many passengers on there at that time? A. There was one or two.

Q. Do you know who they were? A. No, sir.

Q. Did you take their statements of what they saw of what [197—165] happened there?

(Testimony of R. E. Ward.)

A. Well, I don't remember whether I took those or not, because I went as soon as I saw the accident, I went across the street there to telephone.

Q. Did you take the statements of the people around there who saw the accident?

A. The motorman took them while I was crossing over there to telephone.

Q. He took them while you were telephoning?

A. Yes, sir.

Q. How far would you naturally hear that gong if it was sounding?

A. Well, I should say about two blocks anyway.

Q. A good large heavy gong was it?

A. It certainly was.

Q. It was a rotary gong, or one that kept ringing?

A. Yes, sir.

Q. When you first started it, it rang for some time without cessation? A. Yes, sir.

Q. A heavy body you say struck the car?

A. Well, I heard something strike against the front of the car. I didn't know whether it was a team or what it was.

Q. Do you know how far the car ran after that heavy body struck it before it stopped?

A. Well, I should say about 15 or 20 feet.

Q. Are you guessing at that; did you measure it?

A. No.

Q. Are you guessing at it?

A. Well, I judge it didn't go any further than that as near [198—166] as I can estimate.

Q. Do you know that the rear end of the car was

(Testimony of R. E. Ward.)

entirely past the manhole when it stopped?

A. I couldn't tell you that.

Q. Did you get off the car at the rear end?

A. I got off the car at the rear end, yes.

Q. Where did you alight with reference to the manhole?

A. I don't remember where the manhole was.

Q. Did you alight on the crossing?

A. I don't remember that. When I jumped off I seen them picking up the man—

Q. Did the car move on a few feet and then stop after it stopped?

A. No, sir, it stayed there stationary.

Q. Do you recall the people passing around the rear of the car? A. I don't remember.

Q. Would you have left the car standing to block the traffic if it had been across the sidewalk or across the crossing, or would you have moved it on to clear the crossing—when your car stopped after the accident, if the body of the car had been opposite the crossing, would you have left it there or have moved it on a few feet?

A. That was up to the motorman.

Q. Well, it was up to you too, wasn't it?

A. Yes, it was up to me to give him the bells.

Q. Did you give him any bells for that purpose?

A. I did not.

Q. Would you have done so if the crossing had been blocked? [199—167]

A. Well, I suppose I would have in a case of that kind.

(Testimony of R. E. Ward.)

Mr. FALKNOR.—Not much traffic there, is there?

A. No—

Mr. EMERY.—Now, wait a moment; I am not through yet.

Q. How long have you worked for the company?

A. Since the 7th of September, 1912.

Q. Did you work at the street-car business before?

A. No.

Q. Was this your first accident?

Mr. FALKNOR.—I object to that as immaterial.

The COURT.—Objection sustained.

A. Well, it was the first accident, yes; bad one.

Q. Did you examine the man yourself at that time?

A. I did not.

Q. He was unconscious?

A. He was unconscious when they picked him up.

Q. Was he bleeding anywhere?

A. I couldn't say about that.

Q. Didn't you look at him and examine him?

A. I never examined him because I was taking—at least I mean I was over across the street very busy telephoning to try to get the company.

Q. Telephoning for the company's doctor right away? A. Yes, sir.

Mr. EMERY.—That is all.

(Witness excused.) [200—168]

[Testimony of R. R. Higley, for Defendant.]

R. R. HIGLEY, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

(Testimony of R. R. Higley.)

Direct Examination.

(By Mr. FALKNOR.)

Q. You are connected with the Claim Department?

A. Yes, sir.

Q. And was in the vicinity of this accident soon after it happened, were you? A. Yes, sir.

Q. You met the company's physician going away from treating the man?

A. He said that it occurred.

Q. And then you went up and investigated the scene of the accident?

A. Yes, sir, I walked right up there.

Q. Immediately? A. Yes, sir, at once.

Q. Showing you Defendant's Exhibit 4, I will ask you if you made that? A. Yes, sir.

Q. I will ask you to come down here and explain to the jury the situation as you found it upon going up there [201—169] immediately after the accident. A. With reference to what?

Q. Well, to the planks and the hole surrounding it; especially the planks?

A. This side of the street was completely paved; this is the north side—or this is the west side between these tracks. The concrete base had been laid for paving but no paving put on it. This is asphalt here (indicating). This portion in here was excavated, dug out to approximately a foot in depth and that excavation was north of the north cross-walk—extending there and stopped at the south crossing; this portion here including the planking laid down to serve as cross-walks. This manhole was about

(Testimony of R. R. Higley.)
to this cross-walk which consisted of planks about three or four feet long laid in a north and south direction.

Q. They extended from the east rail over to the sidewalk?

A. From the east rail over to the sidewalk, yes. Under this south side of this plank crossing, or this plank that served as a crossing, and just north of this manhole, the dirt had fallen or come down about half the length of the planks; that is, when they had dug this excavation for this thing which was pretty close to these planks, the dirt, being sandy, it crumbled in and it extended about a foot and a half or two feet under these plank.

Q. How did it leave the end of those plank?

A. It left them teetering; that was from within about two foot of the rail—it commenced there at this end of these plank and about two feet from the track [202—170] and ran off about three feet.

Q. Toward the east? A. Toward the east.

Q. And extending about a foot and a half or two feet under? A. Something like that.

Q. Where was the cement board upon which the cement had been mixed?

A. Right here. This was near this rail and right at the center of 55th. That was a number of planks laid in there and the whole thing was probably 12 by 15 feet, I should judge; that is a rough guess. It looked just as if it had been built right there on the ground by putting something down for cross-boards and putting plank on it. Those were two-

(Testimony of R. R. Higley.)

inch plank and a foot in width. They varied to about three and a half to four feet.

Mr. FALKNOR.—That is all.

Q. (By a JUROR.) Was there a stringer laid under the ends of those planks?

A. No, sir, they were laid right down on the street.

Q. (By a JUROR.) Two of the planks projected over the hole?

A. Well, they projected about to the edge of the bottom of the hole and it tapered in then; broke in, but it might have been a little under these planks—the bottom—there were no girders under these planks at all. They were laid down flat on the street.

Q. (By a JUROR.) This man, passing down bricks, stood on these extended ends when he let the brick down?

A. I don't know. I didn't get there until after the accident. [203—171]

Mr. EMERY.—That was the contention as I understand it. I have no questions.

(Witness excused.) [204—172]

[Testimony of O. Davidson, for Defendant.]

O. DAVIDSON, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. FALKNOR.)

Q. You were in the vicinity of this accident when it happened? A. Yes, sir.

Q. How far? A. About a block.

Q. Which way? A. North.

(Testimony of O. Davidson.)

Q. About a block north? A. Yes, sir.

Q. Now, after the accident, did you go to the scene of the accident? A. Yes, sir.

Q. Did you make an examination in regard to these plank? A. Yes, sir.

Q. Have you seen this diagram that Mr. Higley just referred to? A. No, I have not.

Q. Did you notice any plank extending across from the sidewalk? **[205—173]**

A. Yes, there was.

Q. Did you make any special examination of those plank to see how they were laid or how it was excavated underneath? A. Yes.

Q. Explain to the jury what you found there.

A. Well, when I went up there I looked at that plank and it seems as though when they had excavated that the dirt had come from underneath the plank and had left these planking extending over in the hole probably a foot.

Q. If a person stepped on them, was there anything to prevent them from teetering up?

A. No, not anything.

Q. You are connected with the company, are you not? A. Yes, sir.

Q. In what capacity?

A. Transitman Inspector.

Q. You made this diagram here, marked exhibit 6, did you not?

A. No, I had that made under my directions.

Q. Well, it was made under your directions?

A. Yes, sir.

(Testimony of O. Davidson.)

Q. You assisted in taking the measurements?

A. Yes, sir.

Q. How far is it from the east rail to the center of this manhole or air-shaft?

A. Four feet four and one-half inches.

Mr. FALKNOR.—That is all. **[206—174]**

Cross-examination.

(By Mr. EMERY.)

Q. What is the gauge of that railroad?

A. Why, it is an 18-foot right of way.

Q. What is the gauge of the track?

A. Four feet eight and a half inches.

Q. Four feet eight and a half inches?

A. Yes, sir.

Q. How large or how wide is that hole in the ground there?

A. Why approximately five feet and a half.

Q. Mr. Kroon testified here that it was six feet; the hole in the ground was six feet. Do you think might be possibly so?

A. Why yes, it might be possible.

Q. You drew your map here to scale, didn't you?

A. Yes, sir.

Q. Why didn't you have that hole show six feet when this *this* is a four feet eight inch hole here shows about three feet; why didn't you show it the right size in proportion to the tracks, if your tracks are four feet eight inches and your hole ought to be a good deal wider than that. That is just like your plank. Go ahead. That is all.

(Testimony of O. Davidson.)

Mr. FALKNOR.—Let's not get excited about this here now. [207—175]

Redirect Examination.

(By Mr. FALKNOR.)

Q. You gave the dimensions of the hole on this plat, did you not? A. Yes, sir.

Q. They are all there? A. Yes, sir.

Q. All the figures are there? A. Yes, sir.

Q. The position of the hole from the track; now, the manhole on the top is about how big?

A. It is the large end, eight and five-eighths.

Q. This is made to scale, is it not? A. Yes, sir.

Q. A hole that size would require a circle this size (indicating)? A. Yes, sir.

Q. And then you indicated here the dimensions of the air shaft below the surface? A. Yes.

Q. And counsel could see that anyone could see that? A. Yes.

Mr. EMERY.—And the jury can see it from where they sit, too?

Mr. FALKNOR.—There was an insinuation that this was not drawn to scale. That is all. [208—176]

Mr. EMERY.—That is all.

(Witness excused.)

Mr. FALKNOR.—The defendant rests.

Defendant rests. [209—177]

Plaintiff's Testimony in Rebuttal.

[Testimony of Charles J. Schlief, in His Own Behalf (Recalled in Rebuttal).]

CHARLES J. SCHLIEF, the plaintiff, being recalled as a witness in his own behalf, having already been duly sworn, testified as follows:

Direct Examination.

(By Mr. EMERY.)

Q. You stated that you received pay from Krogh & Jessen for work done on 55th Street at the rate of $2.75 per day? A. Yes, sir.

Q. How many hours did you work there?

Mr. FALKNOR.—I object to that.

A. Eight.

Mr. FALKNOR.—Just a moment. That is not rebuttal.

(Argument.)

The COURT.—Let it go in as part of the case in chief. It might be proper for that purpose.

Q. What was the fact. How many hours did you work per day when you got $2.75?

A. Eight.

Q. And when you got $3 a day in the carpenter work, how many hours did you work there?

A. Ten.

Q. And in the gravel pit? [210—178]

A. Ten.

Q. Were you accustomed on the day you were doing this work to stand on the teetering ends of planks projecting over that hole to pass the brick down to

(Testimony of Charles J. Schlief.)
the man? A. No, sir.

Q. Did you stand in any such position as that?

A. No, sir.

Q. Did you get in any such position as that if you know?

Mr. FALKNOR.—I object to the Judge leading the witness.

The COURT.—Yes.

Mr. EMERY.—I am putting it just as you did exactly. That is all.

(Witness excused.)

(Adjournment until two o'clock P. M.) [211—179]

[Proceedings Had January 9, 1914, 2 P. M.]

(Upon reconvening at two o'clock P. M., January 9th, the following proceedings were had:)

[Motion for a Directed Verdict.]

Mr. FALKNOR.—The defendant at this time challenges the sufficiency of the evidence to sustain a verdict for the plaintiff, for the reason that the evidence at this time shows that there was no negligence of the defendant that contributed to or was the proximate cause of the injury, and the evidence introduced shows that any injuries the plaintiff received, if any, were caused by his own careless acts and negligence; and further for the reason that the evidence at this time shows that the plaintiff must look to the Workmen's Compensation Act for any relief, and asks that your Honor instruct the jury to return a verdict for the defendant, for the reasons above stated.

The COURT.—The motion is denied. I will submit the matter to the jury.

Mr. FALKNOR.—The defendant is allowed an exception.

The COURT.—Oh, yes. [212—180]

SECOND EXCEPTION.

The defendant, after the introduction of the evidence, and prior to the submission of the cause to the jury, duly requested the Court in writing to direct the jury to return a verdict for the defendant, which request was denied and the defendant duly and regularly excepted to the said ruling to the Court and the denial of said request, which exception was allowed.

The defendant in support of this exception submits the stenographic report of the trial herein, before set out in support of the First Exception, with all the exhibits, being all the evidence offered and received at the trial herein, and submits the same as a bill of exceptions in support of this its second exception.

THIRD EXCEPTION.

The defendant duly and regularly, prior to the argument of counsel, requested the Court to give the following charge:

> "You are instructed that the motorman of the car in question had a right to presume that its preference and superior right in the use of its track would be respected by the plaintiff, and the motorman in charge of the car had a right to presume that as the car approached the place where the plaintiff was that the plaintiff would

not get upon the track in front of his car, or that if he was on the track or so near that he was in danger of being struck, that he would remove himself off the track and out of the way of danger, and I further charge you that the motorman, relying upon such presumption, was not required to stop his car or even slacken the speed of his car until the danger of a collision between his car and the plaintiff became imminent."

The Court instructed as follows: **[213—180a]**

Court's Instructions.

The COURT.—You, Gentlemen of the Jury, have been selected in this case, and accepted as jurors by both sides because both sides have confidence in your fairness and honesty and integrity and rest upon the belief that you will approach the issue in this case with a fairness and impartiality which will insure justice to both of the litigants in the matter which they have presented. The attorneys are necessarily more or less partizan and their interest is in presenting the theory of their respective claims from the viewpoint which is pleasing to their idea. You, gentlemen, of course, approach the subject from an entirely different viewpoint. You are to divorce every fact from your mind other than the issue which is presented here by the testimony and the law, which it is my duty to give you, as bearing upon the matters and facts in this case. You will dispose of the issues with that fairness and singleness of purpose just the same as you would want twelve men to dispose of a matter for you, whether

you were plaintiff or whether you were defendant in this case.

The issue that you are to determine is formed by the complaint which is filed by the plaintiff and the answer which is submitted by the defendant. These papers you can take with you to the jury-room and read and determine just what is admitted and what is denied. The papers are not, however, to be considered as any evidence in the case, but simply to advise you of the contention made by the respective parties. [214—181]

You are advised that where a statement is admitted by the defendant, which is made by the plaintiff, that no proof need be offered upon that particular statement. That is taken as admitted and is considered as an established fact. The issue of fact, however, which you must determine is where a statement is made upon one side and denied by the other side. If the defendant should say that with relation to any particular fact stated in the complaint, it has no knowledge or information sufficient to form a belief, that that would place the plaintiff upon proof; but I see that all the denials in the answer are specific denials, so that the burden in all of these matters or allegations made by the plaintiff and denied by the defendant, is upon the plaintiff to establish by a fair preponderance of the evidence.

The burden is upon the plaintiff, in the first place to show that the plaintiff was injured and that his injury was caused by the negligence of the defendant, and that but for the act or conduct on the part of the defendant,—I mean by some act of omission

or commission, which was the proximate cause of the injury, the injury would not have happened.

The defendant pleads in its answer contributory negligence; and that is that the plaintiff was guilty of such conduct or such act of either commission or omission, but for which the injury would not have happened.

The burden is upon the defendant to establish the act of contributory negligence by a fair preponderance [215—182] of the evidence.

You are instructed that negligence is defined as the failure to observe for the protection of the interests of another, that degree of care, caution and vigilance which the circumstances demand, whereby such other person suffers an injury; it is the omission to do something which a reasonably prudent man, guided by the considerations which regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The basis of liability for negligence cases is the violation of some legal duty to exercise care.

You are instructed that contributory negligence is such conduct as exhibited the want or lack of ordinary care which, contributing to the acts of the defendant resulted in the injury as the proximate cause of such injury, and without which conduct on the part of the plaintiff, the injury would not have happened. As I have stated to you, the defendant alleging contributory negligence on the part of the plaintiff, this being denied by the plaintiff, shifts

the burden or casts the burden of proving this upon the defendant.

You are instructed that it is admitted that there is an ordinance of the city of Seattle which limits the rate of speed of street-cars in the business or settled residence districts to twelve miles an hour. You are instructed that if you find from the evidence that this accident or collision occurred in the business or settled district of the city of Seattle, and that at the time of the accident the street-car was going a a greater rate [216—183] of speed than twelve miles an hour, then such act would constitute negligence upon the part of the defendant; but the fact that the car was going at a greater rate of speed than twelve miles an hour would not make the defendant liable for the injury if you should find from the evidence that such act of speed above twelve miles an hour was not the proximate cause of the injury, or if you find from the evidence that the plaintiff was guilty of contributory negligence; that is, the failure to exercise such ordinary care as the circumstances demanded which ordinarily prudent men would exercise under such circumstances, and that his negligence, combining and occurring with the rate of speed which the car was running, contributed to the injury as the proximate cause of the injury, and without such contributory negligence on the part of the plaintiff, the injury would not have taken place.

You are instructed that ordinary care is such a degree of care and caution as a reasonably prudent man would use under like circumstances and condi-

tions. The care required in operating street-cars or by persons employed adjacent to street-car tracks is such as an ordinarily prudent and cautious man would exercise under like circumstances and conditions. It is proportionate to the danger to be guarded against and the fatal consequences which are likely to ensue if it is omitted. A greater degree of care and caution is required in the operating of a street-car along a street where men are employed and improvements are being made, which are known to the defendant, adjacent to the track; and [217—184] this is emphasized where the improvement is adjacent to the railway tracks where men are upon and off of the track constantly and irregularly, in the performance of the work in which they are engaged, and this same rule applies to a person who is at work which is adjacent to a street-car track. The rule applies equally to both parties, and the diligence which is required by either party places upon both parties a duty and responsibility which requires of them cautious conduct commensurate with the danger to be guarded against, and the party who fails in the exercise of that diligence, care and caution which the circumstances demand, and because of such failure fatal consequences result, such party is held responsible for such fatal consequences. If in this case, you should find that the plaintiff failed to exercise that degree of care and caution which the circumstances demanded, and because of such failure on his part as the proximate cause thereof he was injured, even though you might find that the defendant likewise failed to exercise

that care and caution which the circumstances demanded, but find that the negligence on the part of the plaintiff, mingling with that of the defendant resulted in the injury and the acts of omission on the part of the plaintiff was the proximate cause thereof and without such act on his part the injury would not have occurred, the plaintiff, under such circumstances cannot recover. On the other hand, if you should find that the plaintiff was negligent, but should further find that such negligence on the part of the plaintiff was not the proximate cause of his injury, [218—185] but that the defendant was negligent, and that the negligence of the defendant was the proximate cause of the injury and without which negligence on the part of the defendant the injury would not have happened, then the defendant would be liable, although the plaintiff was negligent to some degree, as stated to you a moment ago.

If the injury in this case was caused by an act which cannot be accounted for in any other way than that it was an accident,—an event which occurred without fault of either *part* or without the fault of the defendant, then the plaintiff cannot recover in this case.

You are instructed, Gentlemen of the Jury, that you fix the standard for reasonable and prudent men under the circumstances in this case, as you find them, according to your judgment and experience, or what that class of men would do under the circumstances as detailed by the witnesses and evidence in this case, taking into consideration all of the circumstances as detailed to you upon the witness-stand,

and all of the facts and circumstances as disclosed upon the trial, and try it by that standard. The Judge who tries the case cannot supply you with that criterion of judgment. There is no fixed standard in law by which a Court is enabled to arbitrarily say in every case what the conduct shall be considered reasonably prudent, and what shall constitute ordinary care under all circumstances. What might be deemed ordinary care in one case, in another might be gross negligence. The policy of the law has [219—186] therefore relegated such questions to the jury, and under the instructions given you, you must find the standard of care of ordinarily prudent men as applied to the circumstances as you find them in this case. You will take into consideration the street, the improvements that were being made upon the street, the proximity of the improvements upon the street upon which plaintiff was injured to the railway track, the character of work he was doing, the manner in which the work was being performed, the operation of the street-car, the distance the men employed upon this improvement could be seen by the parties operating the street-car, the speed at which the car was operated, the signal or lack of signal given by the men operating the car, the employment of the plaintiff as to the things that he was doing at the time, and the manner in which they were performed, and from all of the facts and circumstances as disclosed in this case determine the right, as twelve honest men with the determination of doing justice between these litigants. Bring to bear upon the issue in this case the same consider-

ation and approach the subject from the same viewpoint and weigh it with the issue—weigh the issue with like concern as you would want twelve men to weigh, consider and determine a matter of like concern to you if you were either plaintiff or defendant in this case.

You are instructed that as a matter of law the defendant company and the plaintiff in this case had equal rights to be upon the street at the point of the accident, and each was required to exercise care and [220—187] caution to avoid an injury, except that a street-car running upon fixed tracks cannot change or alter its course in running, and it is the duty of a person in walking, standing or working near a street railway track upon the streets to so regulate his position and his conduct as to permit the cars to run upon the track and use reasonable care in avoiding a collision. And a person is required to make reasonable use of his eyes and ears; that is, he is required to look and listen for approaching cars when employed near the track and to do such acts as a reasonably prudent man would under like circumstances. The defendant company cannot, however, recklessly run its car at a speed to exceed the limit which is fixed by law without ringing a bell or sounding a gong, irrespective of the presence of the plaintiff's employment near its track.

You are further instructed that the defendant railway company had the right to rely upon the fact that the street along the line of railway would not be used by persons in any other than a reasonable and usual manner, taking into consideration

the improvement that was being made at the time near to its track; and the company was required to exercise reasonable care and caution such as an ordinarily prudent man would under similar circumstances, taking into consideration the improvements that were being made there and the dangers that were apparent by reason of the employment of the plaintiff and others in close proximity to its track. [221—188]

You are instructed that the plaintiff in his employment upon the street at the point of accident, if you find one did take place, had the right to rely upon the fact that the defendant company would not run its car faster than the limit of speed required by the ordinance, and the motorman operating the car would give the usual warning by ringing a bell or sounding a gong to advise plaintiff of the approach of the car; and the motorman operating the car had the right to rely upon the fact that the plaintiff would act as a reasonably prudent man, and would not heedlessly step in front of a car. The duties of the several parties were reciprocal, and each had the right to believe and govern his act accordingly, that the other would act as a reasonably prudent man under similar circumstances.

The mere fact that the plaintiff was injured is no evidence of liability on the part of the defendant, nor is the fact that the car was running more than twelve miles an hour evidence of negligence which was the proximate cause of the inquiry. You are instructed, however, that if, by a fair preponderance of the evidence, you believe that the car was running

more than twelve miles an hour at the place of the accident, the burden of proof, would by such act be shifted to the defendant to show by a fair preponderance of the evidence that the injury, if one was sustained, was the result of contributory negligence on the part of the plaintiff, and that such negligence was the proximate cause of the injury, and without which it would not [222—189] have happened, or if you believe that the injury was the result of an accident, as stated a while ago,—against which neither party could guard against, the plaintiff is remediless.

You are further instructed that in case you should find the plaintiff was working to the north of the manhole in question and at a place where the car could have passed, that as the car was in close proximity at a time when it was impossible to stop the car in time to avoid injuring him,—as the car approached within ten or twelve feet of where the plaintiff was, the plaintiff stepped upon the track, either through the teetering or unsteady effect of a board or otherwise, then you are instructed that the plaintiff, under such circumstances, cannot recover, and it would be immaterial under such circumstances at which rate of speed the car was moving or whether bells were rung or a gong sounded or not.

You are instructed that one of the defenses in this case is that the plaintiff was employed in extra-hazardous work, an employment which comes within the scope of the State Industrial Insurance Act, and that because of the provisions of that Act, he cannot

recover in this case. You are instructed that under the evidence as it is presented before you in this case, that the Act does not apply to the issue before you for consideration, and that you will entirely disregard such defense on the part of the defendant, and determine this case entirely upon the evidence which has been admitted as to the negligence [223—190] on the part of the defendant or the contributory negligence on the part of the plaintiff as outlined and defined in these instructions.

You are instructed that what is meant by a preponderance of the evidence is not alone determined by the number of witnesses testifying to a particular fact or state of facts. In determining upon which side the preponderance of the evidence is you should take into consideration the opportunities of the several witnesses for seeing and knowing the things about which they testify, their conduct and demeanor while testifying, their interest or lack of interest, if any, in the result of the action; the probability or improbability of the truth of their several statements in view of the other evidence, facts and circumstances proved in the trial, and from all of these circumstances determine upon which side the weight or preponderance of the evidence is. Where two witnesses testify opposite to each other on a material point and are the only ones that testify directly to such point, you are not bound to consider the evidence equally balanced or the point not proved; you may give credence to one witness over another, if you find such facts and circumstances warrant it. The test is, which testimony has the greatest convinc-

ing power to your mind, which conveys to your mind the truth with relation to the issue which is presented.

You will try this case solely upon the evidence which has been offered and admitted before you and the law as I have given it to you, disregarding every statement [224—191] of counsel made upon the trial of this cause, either in the presentation of testimony or argument before you upon the facts where the statement is not sustained by the evidence. You will also disregard any remark or statement made by me upon the trial of this cause is passing upon any legal proposition that was presented, and divesting your mind of every other element save and except the testimony as it was admitted by the Court and the law as it is now given to you.

You will consider and weigh the evidence in this case as reasonable men and endeavor to come to an honest conclusion, divesting your mind, as has been stated to you, of all prejudices of all kinds and sympathies of every nature, and arrive at your conclusion unbiased, and endeavor to give this case the same consideration that you would want twelve men to give to a matter of yours of like concern to you.

If you should find for the plaintiff, you will find for such sum or sums as will fairly compensate him for the loss he has suffered and compensate him for the pain and physical suffering he has endured, and is reasonably certain to suffer in the future. If you find for the plaintiff, you will estimate his damage on a strictly pecuniary basis, allowing such sum as will fairly compensate him for the suffering he has

endured and will be reasonably certain to endure in the future, and such loss as he has sustained in earning capacity and is reasonably certain to suffer in the future. You are instructed that the law does not lay down any definite [225—192] set of rules by which the damage may be reached, but this is left largely to the discretion of the jury, excepting the loss in earning capacity to the present time, and also the sums expended in effecting a cure, if you find any shown by the evidence. You must therefore determine as reasonable men, what sum, if any, should be allowed to the plaintiff, taking into consideration all the evidence bearing upon the extent of the injury. You cannot, however, find for him in a greater sum than has been prayed for in the complaint.

You, Gentlemen of the Jury are the sole judges of the facts in this case, and you must determine what the facts are. If I have referred to any fact in this case it is not to indicate any opinion I may have of a single fact but simply stating some proposition of law which has involved the facts. You are likewise the sole judges of the credibility of the witnesses who have testified before you, and in determining the weight of the credence you will attach to the testimony of any witness, you will take into consideration the demeanor of the witness on the witness-stand; his apparent candor or lack of candor; his interest or lack of interest; the opportunity of the witnesses for knowing the things about which they testify; the reasonableness of the story of the several witnesses who have testified, and from all of these, determine the weight of the evidence that has been offered and

admitted. If you should find that any witness has willfully testified falsely concerning any material fact in this case, you will have the right to disregard his entire testimony, except in so far [226—193] as it may be corroborated by other credible evidence detailed on the trial of this case.

Immediately upon retiring to the jury-room you will elect one of your number foreman and when you have agreed upon a verdict you will cause it to be signed by your foreman and report to the Court.

Two forms of verdict will be submitted to you, one reading as follows: "We, the jury in the above-entitled cause, find for the plaintiff and assess his damages in the sum of ——— dollars." If you should find for the plaintiff you will compute the amount and insert it in this verdict and cause it to be signed by your foreman. If you should find for the defendant this will be your form of verdict: "We, the jury in the above-entitled cause, do find for the defendant." If that is your verdict, you will cause that to be signed by your foreman. It will require your entire number of twelve to agree upon a verdict. I do not think of anything else. The bailiffs may be sworn and take you to the jury-room. If there is anything else that occurs to me I will call you back and advise you further.

A JUROR.—Your Honor, there is one point in your instructions that I did not catch fully; referring to if the plaintiff had stepped accidentally on the line when the car was only ten or twelve feet away, then it didn't make any difference as to the speed of the car and the ringing of the bell—did I understand that?

The COURT.—If you should find that the plaintiff, accidentally, either intentionally or otherwise, stepped in front of [227—194] the car when the car was within ten or twelve feet, why it would be immaterial as to the speed at which the car was moving, as there is not any testimony that the car could have been stopped in that time, and that is not an issue. That is a matter for you to determine.

Mr. EMERY.—The question of whether they were ringing the bell at that time to warn him might be very material.

The COURT.—As to whether the bell was rung prior to their coming to that point, that is a matter for your consideration. You may swear the bailiffs.

(Bailiffs sworn.)

(Jury retires.) [228—195]

The foregoing are all the instructions given by the Court.

To the action of the Court in refusing to give the above-requested instruction, the defendant, through its attorneys, duly excepted, for the reason that said instruction was particularly applicable to the facts and that no instruction given by the Court covered the same. The defendant in support of this exception submits the stenographic report of the trial heretofore set out in support of the First Exception, with all the exhibits, being all of the evidence offered and received at the trial herein, and submits the same as a bill of exceptions in support of this its third exception.

FOURTH EXCEPTION.

The defendant duly and regularly prior to the

argument of counsel requested the Court to give the following charge:

> "You are further instructed that it was the duty of the plaintiff to use his senses, his eyes and his ears, especially when working in or about a place where a collision with a car was likely to occur, in order to discover the proximity of a passing car of the defendant, and his failure so to do would constitute contributory negligence and prevent any recovery on his part. The law requires one working in or about a street-car track to be on the lookout and to listen for approaching cars, and if you find in this case that the plaintiff failed to look and listen and that had he looked and listened he would have discovered the car, then his failure so to do would constitute contributory negligence and he cannot recover, and your verdict should be for the defendant."

To the action of the Court in refusing to give the above requested instruction, the defendant, through its attorneys, duly excepted, for the reason that said instruction was particularly applicable to the facts and that no instruction given by the Court covered the same, and that the failure to give the same was prejudicial to the defendant. The defendant in support of this exception submits the stenographic [229—196] report of the trial hereinbefore set out in support of the First Exception, with all the exhibits, being all of the evidence offered and received at the trial herein, together with the Court's instructions set out in defendant's Second Exception as a

bill of exceptions in support of this its fourth exception.

FIFTH EXCEPTION.

The defendant duly and regularly, prior to the argument of counsel, requested the Court to give the following charge:

> "I charge you that in this case that the plaintiff was in the employ of a contractor in the performance of work covered and included under the law of the State of Washington relating to compensation for injured workmen, and that he was engaged at such work at the plant of his employer and that under such law relating to compensation of injured workmen plaintiff is required to look to the State of Washington for compensation for injuries received herein."

To the action of the Court in refusing to give the above-requested instruction, the defendant, through its attorneys, duly excepted, for the reason that said instruction was particularly applicable to the facts and that no instruction given by the Court covered the same, and that the failure to give the same was prejudicial to the defendant. The defendant in support of this exception submits the stenographic report of the trial hereinbefore set out in support of Exception I with all the exhibits, being all of the evidence offered and received at the trial herein, together with the Court's instructions set out in defendant's Second Exception as a bill of exceptions in support of this its fifth exception.

SIXTH EXCEPTION.

In the charge of the Court to the jury, the Court

gave the following instruction: [230—197]

> "The defendant company cannot, however, recklessly run its cars at a speed irrespective of the presence of the plaintiff's employment near its track."

to the giving of which the defendant duly excepted, which exception was allowed.

The above and foregoing transcription of the evidence introduced upon the trial offered in support of the defendant's First Exception is all the evidence given upon the trial of the action, and the defendant offers the same with all the exhibits, together with the Court's instructions set out in defendant's Third Exception, as a bill of exceptions in support of this its sixth exception.

SEVENTH EXCEPTION.

In the charge of the Court to the jury, the Court gave the following instruction:

> "You are instructed that one of the defenses in this case is that the plaintiff was employed in extra-hazardous work, an employment which comes within the scope of the State Industrial Insurance Act, and that because of the provisions of that Act, he cannot recover in this case. I instruct you that under the evidence as it is presented before you in this case, that the act does not apply to the issue before you for consideration and that you will entirely disregard such defense on the part of the defendant and determine this case entirely upon the evidence which has been admitted as to the negligence on the part of the defendant, or contributory negli-

gence on the part of the plaintiff, as outlined and defined in these instructions."

to the giving of which the defendant duly excepted, which exception was allowed.

The above and foregoing transcription of the evidence introduced upon the trial, offered in support of the defendant's First Exception, is all the evidence given upon the trial of the action, and the defendant offers the same with all the exhibits, together with the Court's instructions set out in defendant's Third Exception, as a bill of exceptions in support of this its seventh exception. **[231—198]**

EIGHTH EXCEPTION.

In the charge of the Court to the jury, the Court gave the following instruction:

"You are instructed, however, that if by a fair preponderance of the evidence, you believe that the car was running more than twelve miles an hour at the place of the accident, the burden of proof would, by such act be shifted to the defendant to show by a fair preponderance of the evidence that the injury, if one was sustained, was the result of contributory negligence on the part of the plaintiff and that such negligence was the proximate cause of the injury and without which it would not have happened."

to the giving of which the defendant duly excepted, which exception was allowed.

The above and foregoing transcription of the evidence introduced upon the trial, offered in support of the defendant's First Exception, is all the evidence given upon the trial of the action, and the defendant

offers the same with all the exhibits, together with the Court's instructions set out in defendant's Third Exception, as a bill of exceptions in support of this its eighth exception.

Whereupon counsel for the defendant presents the foregoing as its Bill of Exceptions in the above case and prays that the same may be settled, allowed, signed and certified by the Judge of said court.

JAMES B. HOWE,
A. J. FALKNOR,
Attorneys for Defendant. [232—199]

In the District Court of the United States for the Western District of Washington, Northern Division.

No.——.

CHARLES J. SCHLEIF,
Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation,
Defendant.

Order Allowing Bill of Exceptions.

The foregoing Bill of Exceptions, proposed by the defendant, consisting of pages 1 to 199, inclusive, having been duly served upon the attorneys for the plaintiff within due time, and the attorneys for plaintiff not having proposed any amendments and waiving any further time in which to propose any amendments to said Bill of Exceptions, and said Bill of

Exceptions having been duly delivered by the proposing party to the Clerk of the above court for the Judge thereof, and said Clerk having delivered said Bill of Exceptions to the Judge of said Court, and the attorneys for both plaintiff and defendant being present and consenting to the settling of said Bill of Exceptions, and said Bill of Exceptions conforming to the truth and being in proper form;

Now, therefore, I, the undersigned Judge of the above-named court and the Judge who tried the above-entitled action, hereby certify that the above and foregoing bill is a true bill of exceptions. The same is approved, allowed and settled, and ordered filed and made a part of the record in said cause.

Done in open court this 29th day of January, 1914.

JEREMIAH NETERER,
Judge. [233]

O. K.—G. D. E.

Copy of within proposed Bill of Exceptions of defendant received and service acknowledged this 27th day of January, 1914.

GEO. D. EMERY,
Attorney for Plaintiff.

[Indorsed]: Defendant's Proposed Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jan. 29, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [234]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2508.

CHARLES J. SCHLEIF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation,

Defendant.

Assignment of Errors.

Comes now the Puget Sound Traction, Light & Power Company, a corporation, the defendant above named, in connection with its petition for writ of error herein, and makes the following assignment of errors, and particularly specifies the following as the error upon which it will rely and which it will urge upon the prosecution of its said writ of error in the above-entitled cause, and which it avers occurred upon the trial of said cause, to wit:

I.

The Court erred in rendering judgment in favor of the plaintiff and against the defendant.

II.

The Court erred in overruling and denying defendant's challenge to the sufficiency of the evidence to sustain the verdict for the plaintiff and in overruling defendant's motion to instruct the jury to return a verdict for the defendant.

III.

The Court erred in overruling defendant's motion

for a new trial. [235]

IV.

The Court erred in refusing to give the following instruction to the jury requested by defendant, to wit:

"You are instructed to return a verdict in favor of defendant and against the plaintiff."

V.

The Court erred in refusing to give the following instruction:

"You are instructed that the motorman of the car in question had a right to presume that its preference and superior right in the use of its track would be respected by the plaintiff, and the motorman in charge of the car had a right to presume that as the car approached the place where the plaintiff was that the plaintiff would not get upon the track in front of his car, or that if he was on the track or so near that he was in danger of being struck, that he would remove himself off the track and out of the way of danger, and I further charge you that the motorman relying upon such presumption was not required to stop his car or even slacken the speed of his car until the danger of a collision between his car and the plaintiff became imminent."

VI.

The Court erred in refusing to give the following instruction to the jury requested by the defendant, to wit:

"You are further instructed that it was the duty of the plaintiff to use his senses, his eyes

and his ears, especially when working in or about a place where a collision with a car was likely to occur, in order to discover the proximity of a passing car of the defendant, and his failure so to do would constitute contributory negligence and prevent any recovery on his part. The law requires one working in or about a street-car track to be on the lookout and to listen for approaching cars, and if you find in this case that the plaintiff failed to look and listen and that had he looked and listened he would have discovered the car, then his failure so to do would constitute contributory negligence and he cannot recover, and your verdict should be for the defendant."

VII.

The Court erred in refusing to give the following instruction to the jury requested by the defendant, to wit: [236]

"I charge you that in this case that the plaintiff was in the employ of a contractor in the performance of work covered and included under the law of the State of Washington relating to compensation for injured workmen, and that he was engaged at such work, at the plant of his employer and that under such law relating to compensation of injured workmen plaintiff is required to look to the State of Washington for compensation for injuries received herein."

VIII.

The Court erred in giving the following instruction to the jury, to wit:

"The defendant company cannot, however,

recklessly run its cars at a speed irrespective of the presence of the plaintiff's employment near its track."

IX.

The Court erred in giving the following instruction to the jury, to wit:

"You are instructed that one of the defenses in this case is that the plaintiff was employed in extra-hazardous work, an employment which comes within the scope of the State Industrial Insurance Act, and that because of the provisions of that Act, he cannot recover in this case. I instruct you that under the evidence as it is presented before you in this case, that the act does not apply to the issue before you for consideration and that you will entirely disregard such defense on the part of the defendant and determine this case entirely upon the evidence which has been admitted as to the negligence on the part of the defendant, or contributory negligence on the part of the plaintiff, as outlined and defined in these instructions."

X.

The Court erred in giving the following instruction to the jury, to wit:

"You are instructed, however, that if by a fair preponderance of the evidence, you believe that the car was running more than twelve miles an hour at the place of the accident, the burden of proof would, by such act be shifted to the defendant to show by a fair preponderance of the evidence that the injury, if one was sustained,

was the result of contributory negligence on the part of the plaintiff and that such negligence was the proximate cause of the injury and without which it would not have happened." [237]

Wherefore said Puget Sound Traction, Light & Power Company, plaintiff in error, prays that said judgment of the District Court of the United States for the Western District of Washington, Northern Division, be reversed, and that said Court be instructed to grant a new trial of said cause.

JAMES B. HOWE,
A. J. FALKNOR,
Attorneys for Defendant.

[Indorsed]: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 1, 1914, 1:40 P. M. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [238]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2508.

CHARLES J. SCHLEIF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation,

Defendant.

Petition for Writ of Error.

And now comes Puget Sound Traction, Light & Power Company, a corporation, defendant herein,

and says: That on the 13th day of January, 1914, this Court entered judgment herein in favor of the the plaintiff above named and against the defendant above named, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will appear in detail from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error issue in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record and proceedings, with all things concerning the same, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

JAMES B. HOWE,
A. J. FALKNOR,
Attorneys for Defendant. [239]

[Indorsed]: Petition for Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Apr. 1, 1914, 1:40 P. M. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [240]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2508.

CHARLES J. SCHLEIF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation,

Defendant.

Order Allowing Writ of Error.

On this 1st day of April, 1914, came the defendant Puget Sound Traction, Light & Power Company, a corporation, by its attorneys, and filed herein and presented to the Court its petition, praying for the allowance of a writ of error and an assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings in said cause, with all things concerning the same, be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

On consideration whereof, the Court does hereby allow the writ of error prayed for. It is further ordered that a bond, in the sum of Four Thousand Dollars ($4,000.00), conditioned according to law, be executed in behalf of the above-named defendant, with good and sufficient surety, to be approved by the undersigned, and that upon said bond being executed, approved and filed, the said judgment in this cause shall forthwith be superseded and all proceedings in this cause stayed until the final determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit. [241]

Dated this 1st day of April, 1914.

JEREMIAH NETERER,

District Judge of the United States, for the Western District of Washington, Presiding in said Circuit.

[Indorsed]: Order Allowing Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Apr. 1, 1914, 2:10 P. M. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [242]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2508.

CHARLES J. SCHLEIF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, Puget Sound Traction, Light & Power Company, a corporation, defendant above named as principal, and the Massachusetts Bonding & Insurance Company, a corporation duly organized and existing under and by virtue of the laws of the State of Massachusetts, and duly authorized and empowered to become surety upon bonds and to transact business as a surety company in the State of Washington, as surety, are held and firmly bound unto Charles J. Schleif, plaintiff above named, in the sum of Four Thousand Dollars ($4,000), lawful money of the United States, to be paid to said Charles J. Schleif, his heirs, executors,

administrators and assigns for which payment, well and truly to be made, we do hereby bind ourselves, our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated at Seattle, Washington, this 1st day of April, A. D. 1914.

Whereas, lately, at a District Court of the United States, for the Western District of Washington, Northern Division, [243] in a suit pending in said court, between Charles J. Schleif, and Puget Sound Traction, Light & Power Company, a corporation, defendant, a judgment was rendered in favor of said plaintiff and against said defendant in the sum of One Thousand Four Hundred and Seventy Dollars ($1,470.00) and costs, and the said Puget Sound Traction, Light & Power Company having obtained a writ of error, and filed a copy thereof in the office of the clerk of said court, to reverse the judgment in the aforesaid suit, and a citation directed to said Charles J. Schleif, plaintiff, as aforesaid, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, State of California, in said circuit;

Now, therefore, the condition of the above obligation is such that if the said Puget Sound Traction, Light & Power Company shall prosecute its writ of error to effect and shall answer all costs and damages that may be awarded against it, including all just damages for delay and costs and interest on the appeal, if it shall fail to make its plea good, then the above obligation to be void; otherwise to remain in

full force and effect.

It is hereby expressly agreed by said surety that in case of a breach of any condition hereof, the above-named District Court of the United States for the Western District of Washington, Northern Division, may, upon notice to said surety of not less than ten (10) days, proceed summarily in the above-entitled action to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against said surety, and award execution therefor. [244]

PUGET SOUND TRACTION, LIGHT & POWER COMPANY,

By A. L. KEMPSTER,

[Corporate Seal] Manager.

Attest: JAMES B. HOWE,

Assistant Clerk.

MASSACHUSETTS BONDING & INSURANCE COMPANY,

[Corporate Seal] By FRED B. ROTWIN,

Attorney in Fact.

The foregoing bond is hereby approved as a bond on writ of error and supersedeas bond, this 1st day of April, 1914.

JEREMIAH NETERER,

Judge of the District Court of the United States, Presiding in the United States District Court for the Western District of Washington, Northern Division.

[Endorsed]: Bond on Writ of Error. Filed in the U. S. District Court, Western Dist. of Washing-

ton, Northern Division, Apr. 1, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [245]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2508.

CHARLES J. SCHLEIF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation,

Defendant.

Proof of Service.

State of Washington,
County of King,—ss.

E. A. La Fortune, being first duly sworn, on oath deposes and says: That on the 2d day of April, 1914, he served the Assignment of Errors, Petition for Writ of Error, Bond on Writ of Error and Order Allowing Writ of Error, upon the plaintiff by leaving true and correct copies thereof with the stenographer in charge of the office of Geo. D. Emery, attorney for plaintiff, 419 Central Building, Seattle, Washington, the said Geo. D. Emery being then and there absent from said office and said city.

Further affiant saith not.

E. A. LA FORTUNE.

Subscribed and sworn to before me this 6th day of April, 1914.

[Seal] R. G. SHARPE,
Notary Public in and for the State of Washington,
Residing at Seattle. [246]

[Endorsed]: Proof of Service. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 6, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [247]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2508.

CHARLES J. SCHLEIF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation,

Defendant.

Order [Directing Certification of Certain Original Exhibits].

IT IS HEREBY ORDERED that Plaintiff's Exhibits "A" to "H," inclusive, and Defendant's Exhibits 1 to 12, inclusive, need not be set out by copy or otherwise in the transcript of record upon writ of error, but that the same shall be certified up to the Circuit Court of Appeals for the Ninth Circuit with the transcript of the Bill of Exceptions.

Dated this 10th day of April, 1914.

JEREMIAH NETERER,
Judge.

[Endorsed]: Order. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 10, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [248]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2508.

CHARLES J. SCHLEIF,
Defendant in Error,

vs.

PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation,
Plaintiff in Error.

Praecipe for Transcript of Record.

To the Clerk of the above-entitled Court:

You will please prepare, certify and forward, as provided by law, to the United States Circuit Court of Appeals, for the Ninth Circuit, as the record on writ of error to the District Court of the United States, for the Western District of Washington, Northern Division, a complete transcript of the following files, records and proceedings in the above-entitled cause, to wit:

Complaint.

Answer.

Reply.

Verdict.

Judgment.

Petition for New Trial.

Order Overruling Petition for New Trial.

Stipulation for Extension of Time to File Bill of Exceptions.

Order Granting Extension of Time to File Bill of Exceptions. **[249]**

Bill of Exceptions and Proof of Service Thereto Attached.

Assignment of Errors.

Petition for Writ of Error.

Order Allowing Writ of Error.

Bond on Writ of Error.

Order.

Original Writ of Error.

Original Citation and Marshal's Return of Service Thereon.

Affidavit of E. A. La Fortune.

This Praecipe.

JAMES N. HOWE,
A. J. FALKNOR,
Attorneys for Defendant.

[Indorsed]: Praecipe for Transcript of Record. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Apr. 6, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. **[250]**

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2508.

CHARLES J. SCHLEIF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record, etc.

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify the foregoing 263 typewritten pages, numbered from 1 to 263, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause on Writ of Error therein in the United States Circuit Court of Appeals for the Ninth Circuit, and as is called for by counsel herein in their Praecipe, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on return to said Writ of Error herein from the judgment of said United States District Court for the Western District of Washington to the United

States Circuit Court of Appeals for the Ninth Circuit. [251]

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiff in error for the preparation and certification of the typewritten transcript of record issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fee (Sec. 828 R. S. U. S. as Amended by Sec. 6, Act of March 2, 1905) for making transcript of the record for printing purposes—	
560 folios at 30c per folio	$168.00
Certificate of Clerk to typewritten transcript of record—3 folios	.90
Seal to said certificate	.40
Certificate of Clerk to original exhibits—	
3 folios	.90
Seal of said certificate	.40
	$170.60

I hereby certify that the above cost for preparing and certifying record amounting to $170.60 has been paid to me by Messrs. James B. Howe and A. J. Falknor, attorneys for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original Writ of Error and original Citation issued in this cause.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court

at Seattle, in said District, this 13th day of April, 1914.

[Seal] FRANK L. CROSBY,
Clerk.
Ed M. Lakin,
Deputy. **[252]**

Writ of Error [Copy].

UNITED STATES OF AMERICA.

The President of the United States of America, to the Honorable the Judges of the District Court of the United States, for the Western District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment upon a verdict which is in the said District Court before you, or some of you, between Charles J. Schleif, the original plaintiff and defendant in error, and Puget Sound Traction, Light & Power Company, a corporation, the original defendant and plaintiff in error, manifest error hath happened to the damage of said Puget Sound Traction, Light & Power Company, plaintiff in error, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you

have the same at San Francisco, California, in said circuit, on the 1st day of May next; and that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, which of right and according to law and custom of the United States ought to be done.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, the 1st day of April, in the [253] year of our Lord one thousand nine hundred and fourteen.

[Seal of the U. S. District Court, Western Dist. of Wash.]

FRANK L. CROSBY,
Clerk of the United States District Court for the Western District of Washington.

Ed M. Lakin,
Deputy.

Allowed by:

JEREMIAH NETERER,
District Judge of the United States, Presiding in the District Court of the United States, for the Western District of Washington, Northern Division.

Dated April 1st, 1914.

Received this 1st day of April, 1914, a true copy

of the foregoing writ of error, for the defendant in error.

FRANK L. CROSBY,
Clerk of the District Court of the United States for the Western District of Washington, Northern Division.

By Ed M. Lakin,
Deputy.

[Indorsed]: Original. No. 2508. In the District Court of the United States for the Western District of Washington, Northern Division. Charles J. Schleif, Plaintiff, vs. Puget Sound Traction, Light & Power Co., a Corporation, Defendant. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Apr. 1, 1914, 2:12 P. M. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. James B. Howe, A. J. Falknor, P. O. and Office Address, Room 403 Electric Building, 7th Ave. and Olive St., Seattle, Wash., Attorneys for Defendant. **[254]**

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2508.

CHARLES J. SCHLEIF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation,

Defendant.

Citation on Writ of Error [Copy].

United States of America.

The President of the United States of America, to Charles J. Schleif, Greeting:

You are cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the courtroom of said court, in the city of San Francisco, in the State of California, within thirty (30) days after the date of this citation, pursuant to writ of error filed in the clerk's office of the District Court of the United States, for the Western District of Washington, Northern Division, wherein Puget Sound Traction, Light & Power Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, the 1st [255] day of April, in the year of our Lord one thousand nine hundred and fourteen.

JEREMIAH NETERER,

Judge of the District Court of the United States, Presiding in the District Court of the United States for the Western District of Washington, Northern Division.

RETURN ON SERVICE OF WRIT.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the annexed Citation on the therein named Charles J. Schleif, by handing to and leaving a true and correct copy thereof with Mrs. Clara Schleif, his wife, personally, at his regular place of abode, at Seattle, in said District, on the 2d day of April, A. D. 1914.

JOHN M. BOYLE,
U. S. Marshal.
By Wm. D. Downey,
Deputy.

Marshal's fees, $2.36.

RETURN ON SERVICE OF WRIT.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the annexed Citation on Geo. D. Emery, by handing to and leaving a true and correct copy thereof with Miss Elva Perry, stenographer for Geo. D. Emery, personally, at Seattle, in said District on the 2d day of April, A. D. 1914, in accordance with request of attorneys for defendants.

JOHN M. BOYLE,
U. S. Marshal.
By Wm. D. Downey,
Deputy. **[256]**

Marshal's fees, $2.06.

[Indorsed]: Original. No. 2508. In the District Court of the United States for the Western District of Washington, Northern Division. Charles J.

Schleif, Plaintiff, vs. Puget Sound Traction, Light & Power Co., a Corporation, Defendant. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 3, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. James B. Howe, A. J. Falknor, P. O. and Office Address, Room 403 Electric Building, 7th Ave. and Olive St., Seattle, Wash., Attorneys for Defendants. [257]

Writ of Error [Original].

UNITED STATES OF AMERICA.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States, for the Western District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment upon a verdict which is in the said District Court before you, or some of you, between Charles J. Schleif, the original plaintiff and defendant in error, and Puget Sound Traction, Light & Power Company, a corporation, the original defendant and plaintiff in error, manifest error hath happened to the damage of said Puget Sound Traction, Light & Power Company, plaintiff in error, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals

for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said circuit, on the 1st day of May next; and that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, which of right and according to law and custom of the United States ought to be done.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, the 1st day of April, in the [258] year of our Lord one thousand nine hundred and fourteen.

[Seal] FRANK L. CROSBY,
Clerk of the United States District Court for the Western District of Washington.

Ed M. Lakin,
Deputy.

Allowed by:

JEREMIAH NETERER,
District Judge of the United States, Presiding in the District Court of the United States, for the Western District of Washington, Northern Division.

Dated April 1st, 1914.

Received this 1st day of April, 1914, a true copy of the foregoing writ of error, for the defendant in error.

FRANK L. CROSBY,
Clerk of the District Court of the United States for the Western District of Washington, Northern Division.

By Ed M. Lakin,
Deputy. [259]

[Endorsed]: No. 2508. In the District Court of the United States for the Western District of Washington, Northern Division. Charles J. Schleif, Plaintiff, vs. Puget Sound Traction, Light & Power Co., a Corporation, Defendant. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 1, 1914, 2:12 P. M., Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. **[260]**

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2508.

CHARLES J. SCHLEIF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation,

Defendant.

Citation on Writ of Error [Original].

United States of America.

The President of the United States of America, to Charles J. Schleif, Greeting:

You are cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the courtroom of said court, in the city of San Francisco, in the State of California, within thirty (30) days after the date of this citation, pursuant to writ of error filed in the clerk's office of the District Court of the United States, for the West-

ern District of Washington, Northern Division, wherein Puget Sound Traction, Light & Power Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, the 1st [261] day of April, in the year of our Lord one thousand nine hundred and fourteen.

JEREMIAH NETERER,
Judge of the District Court of the United States, Presiding in the District Court of the United States for the Western District of Washington, Northern Division. [262]

RETURN ON SERVICE OF WRIT.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the annexed Citation on the therein named Charles J. Schleif by handing to and leaving a true and correct copy thereof with Mrs. Clara Schleif, his wife, personally, at his regular place of abode at Seattle, in said District, on the 2d day of April, A. D. 1914.

JOHN M. BOYLE,
U. S. Marshal.
By Wm. D. Downey,
Deputy.

Marshal's fees, $2.36. [263]

RETURN ON SERVICE OF WRIT.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the annexed Citation on Geo. D. Emery, by handing to and leaving a true and correct copy thereof with Miss Elva Perry, stenographer for Geo. D. Emery, personally, at Seattle, in said District, on the 2d day of April, A. D. 1914, in accordance with request of Attorneys for Defendants.

JOHN M. BOYLE,
U. S. Marshal.
By Wm. D. Downey,
Deputy.

Marshal's fees, $2.06.

Copy of within Citation received and service acknowledged this —— day of April, 1914.

_____,
Attorney for Plaintiff.

[Endorsed]: No. 2508. In the District Court of the United States for the Western District of Washington, Northern Division. Charles J. Schleif, Plaintiff, vs. Puget Sound Traction, Light & Power Co., a Corporation, Defendant. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 3, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

[Endorsed]: No. 2407. United States Circuit Court of Appeals for the Ninth Circuit. Puget Sound Traction, Light & Power Company, a Corporation, Plaintiff in Error, vs. Charles J. Schleif, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Received and filed April 17, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

In the Circuit Court of Appeals of the United States for the Ninth Circuit.

No. ——.

PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation,
Plaintiff in Error,

vs.

CHARLES J. SCHLEIF,
Defendant in Error.

Statement of Record to be Printed.

To the Clerk of the Above-named Court:

You will please cause to be printed the entire record in the above-entitled action, including the certificate of the Clerk of the District Court of the United States for the Western District of Washing-

ton thereto, this statement, the order of said District Clerk of said District Court to prepare and transmit to the above-named court the record on appeal and return to writ of error, and the entry of appearance for plaintiff in error.

A statement of the documents to be printed, which includes the entire record in said action, is as follows:

1. This Statement.
2. Complaint.
3. Answer.
4. Reply.
5. Verdict.
6. Judgment.
7. Petition for New Trial.
8. Order Overruling Petition for New Trial.
9. Stipulation for Extension of Time to File Bill of Exceptions,
10. Order Granting Extension of Time to File Bill of Exceptions.
11. Bill of Exceptions and Acknowledgment of Service Thereon.
12. Assignment of Errors.
13. Petition for Writ of Error.
14. Order Allowing Writ of Error.
15. Bond on Writ of Error.
16. Original Writ of Error.
17. Original Citation and Marshal's Return of Service Thereof.
18. Affidavit of E. A. La Fortune as to Service of Papers.
19. Praecipe for Transcript of Record.

20. Order Relating to Exhibits.
21. Entry of Appearance for Plaintiff in Error.

JAMES B. HOWE,
A. J. FALKNOR,
Attorneys for Plaintiff in Error.

[Endorsed]: No. 2407. In the Circuit Court of Appeals of the United States for the Ninth Circuit. Puget Sound Traction, Light & Power Company, a Corporation, Plaintiff in Error, vs. Charles J. Schleif, Defendant in Error. Statement of Record to be Printed. Filed Apr. 14, 1914. F. D. Monckton, Clerk. Refiled Apr. 17, 1914. F. D. Monckton, Clerk.

In the Circuit Court of Appeals of the United States for the Ninth Circuit.

No. ——

PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation,
Plaintiff in Error,

vs.

CHARLES J. SCHLEIF,
Defendant in Error.

Praecipe for Entry of Appearance [of Attorneys for Plaintiff in Error].

To the Clerk of the Above-named Court:

You will please enter our appearance as attorneys for plaintiff in error in the above-entitled action.

JAMES B. HOWE,
A. J. FALKNOR,
Attorneys for Plaintiff in Error.

Office Address: 403 Electric Building, Seattle, Washington.

[Endorsed]: No. 2407. In the Circuit Court of Appeals of the United States for the Ninth Circuit. Puget Sound Traction, Light & Power Company, a Corporation, Plaintiff in Error, vs. Charles J. Schleif, Defendant in Error. Praecipe for Entry of Appearance. Filed Apr. 14, 1914. F. D. Monckton, Clerk. Refiled Apr. 17, 1914. F. D. Monckton, Clerk.